No. 15-8049 *** CAPITAL CASE ***

Title: Duane Edward Buck, Petitioner

v.

Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division

Docketed: February 4, 2016

Lower Ct: United States Court of Appeals for the Fifth Circuit

Case Nos.: (14-70030)

Decision Date: August 20, 2015

Rehearing Denied: November 6, 2015

Questions Presented

---Date---	------Proceedings and Orders----------
Feb 4 2016	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 7, 2016)
Mar 2 2016	Order extending time to file response to petition to and including March 21, 2016.
Mar 7 2016	Brief amici curiae of Mark L. Earley, et al. filed.
Mar 21 2016	Brief of respondent William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division in opposition filed.
Apr 4 2016	Reply of petitioner Duane Edward Buck filed.
Apr 7 2016	DISTRIBUTED for Conference of April 22, 2016.
Apr 15 2016	Rescheduled.
Apr 25 2016	DISTRIBUTED for Conference of April 29, 2016.
Apr 27 2016	Rescheduled.
May 9 2016	DISTRIBUTED for Conference of May 12, 2016.
May 11 2016	Rescheduled.
May 16 2016	DISTRIBUTED for Conference of May 19, 2016.
May 23 2016	DISTRIBUTED for Conference of May 26, 2016.
May 31 2016	DISTRIBUTED for Conference of June 2, 2016.
Jun 6 2016	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jun 9 2016	Consent to the filing of amicus curiae briefs in support of either party or of neither party from counsel for the respondent.
Jul 13 2016	SET FOR ARGUMENT on Wednesday, October 5, 2016.
Jul 14 2016	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 28, 2016.
Jul 19 2016	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Jul 22 2016	Record requested from U.S.C.A. 5th Circuit.
Jul 22 2016	Record from U.S.C.A. 5th Circuit is electronic and located on PACER.
Jul 28 2016	Joint appendix filed. (Statement of costs filed.)
Jul 28 2016	Brief of petitioner Duane Edward Buck filed.

Jul 29 2016	Brief amicus curiae of National Black Law Students Association filed.
Aug 4 2016	Brief amicus curiae of Constitutional Accountability Center filed.
Aug 4 2016	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Aug 4 2016	Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed.
Aug 4 2016	Brief amici curiae of Former Prosecutors filed.
Aug 4 2016	Brief amicus curiae of David Boyle filed.
Aug 19 2016	CIRCULATED.
Aug 29 2016	Brief of respondent Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division filed. (Distributed)
Sep 28 2016	Reply of petitioner Duane Edward Buck filed. (Distributed)
Oct 5 2016	Argued. For petitioner: Christina A. Swarns, New York, N. Y. For respondent: Scott A. Keller, Solicitor General, Austin, Tex.
Feb 22 2017	Judgment REVERSED and case REMANDED. Roberts, C. J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed a dissenting opinion, in which Alito, J., joined.
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RECORD AND BRIEFS

No. 15-8049

ORIGINAL

IN THE

Supreme Court of the United States

Duane Edward Buck,
Petitioner-Appellant

v.

William Stephens, Director, Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent-Appellee

Supreme Court, U.S.
FILED
FEB 04 2016
OFFICE OF THE CLERK

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Duane Buck's death penalty case raises a pressing issue of national importance: whether and to what extent the criminal justice system tolerates racial bias and discrimination. Specifically, did the United States Court of Appeals for the Fifth Circuit impose an improper and unduly burdensome Certificate of Appealability (COA) standard that contravenes this Court's precedent and deepens two circuit splits when it denied Mr. Buck a COA on his motion to reopen the judgment and obtain merits review of his claim that his trial counsel was constitutionally ineffective for knowingly presenting an "expert" who testified that Mr. Buck was more likely to be dangerous in the future because he is Black, where future dangerousness was both a prerequisite for a death sentence and the central issue at sentencing?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

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C. Order of the United States District Court for the Southern District of Texas (Houston Division), *Buck v. Thaler*, No. 04-03965 (S.D.Tex. March 11, 2015)

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E. Memorandum and Order of the United States District Court for the Southern District of Texas (Houston Division), *Buck v. Dretke*, 04-03965 (S.D. Tex. July 24, 2006)

F. Certificate of Appealability Review

PETITION FOR WRIT OF CERTIORARI

Duane Buck respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The November 6, 2015 opinion of the Court of Appeals denying rehearing *en banc* is available at 2015 WL 6874749 (5th Cir., Nov. 6, 2015) and attached as Appendix A. The August 20, 2015 panel opinion of the Court of Appeals denying Mr. Buck a COA is reported at 623 F App'x 668 and attached as Appendix B. The March 11, 2015 Order of the United States District Court for the Southern District of Texas denying Mr. Buck's motion to alter or amend that Court's prior judgment is unreported and attached as Appendix C. The August 29, 2014 Memorandum and Order of the United States District Court for the Southern District of Texas denying Mr. Buck's motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) is unreported and attached as Appendix D. The July 24, 2006 Memorandum and Order of the United States District Court for the Southern District of Texas denying Mr. Buck's Petition for Writ of Habeas Corpus is unreported and attached as Appendix E.

JURISDICTION

The Court of Appeals entered its judgment on November 6, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments. The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in relevant part:

> . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the application of 28 U.S.C. § 2253(c), which states:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;
>
> . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. Introduction

By any measure, Duane Buck's death sentence is extraordinary. At sentencing, his trial attorney presented "bizarre and objectionable" testimony from a "defense expert" that Mr. Buck was more likely to be dangerous in the future because he is Black. *Buck v. Thaler*, 132 S. Ct. 32, 33 (2011) (statement of Alito, J., concerning the denial of certiorari). In Texas, future dangerousness is a prerequisite for a death sentence, and, in Mr. Buck's case, it was the central disputed issue at sentencing. Four years after Mr. Buck was sentenced to death, Texas acknowledged that such race-as-dangerousness testimony is unconstitutional and undermines not only the integrity of Mr. Buck's death sentence but also the integrity of the criminal justice system overall. Texas therefore promised to concede error and waive its procedural defenses in Mr. Buck's case, but it reneged on that promise. Then, in 2011, a majority of this Court left no doubt that the race-as-dangerousness evidence presented at Mr. Buck's sentencing hearing is deeply troubling. If these plainly extraordinary circumstances—when viewed in combination with intervening precedent from this Court which, for the first time, allows federal review of Mr. Buck's procedurally defaulted ineffective assistance of counsel (IAC) claim—do not justify relief under Rule 60(b)(6), then that Rule has no meaning.

Yet, when presented with these extraordinary facts and circumstances, the Fifth Circuit declared that Mr. Buck "ha[d] not made out even a minimal showing

that his case is exceptional," and that his ineffectiveness claim is "unremarkable as far as IAC claims go." App. B at 7, 9. As a result, the Fifth Circuit not only denied relief, it concluded that Mr. Buck had not made the threshold showing required to grant a COA. That conclusion, as Judge Dennis recognized in his dissent from the denial of rehearing *en banc*, is wrong under any standard of review; the circumstances identified by Mr. Buck "describe a situation that is at least debatably 'extraordinary.'" App. A at 6.

B. The Capital Trial Proceedings

In 1996, Duane Buck, an African-American man, was charged with capital murder in connection with the shooting deaths of Debra Gardner and Kenneth Butler in Houston, Texas. Mr. Buck was represented at trial by appointed counsel, Danny Easterling and Jerry Guerinot. Mr. Guerinot has a well-documented history of inadequate representation of his capitally charged clients: by 2010, "[t]wenty of Mr. Guerinot's clients ha[d] been sentenced to death."[1] That was then more than the number of prisoners sentenced to death "in about half of the 35 states that ha[d] the death penalty."[2]

In preparation for Mr. Buck's capital trial, counsel retained a psychologist, Dr. Walter Quijano, to assess, *inter alia*, whether Mr. Buck was likely to commit criminal acts of violence in the future—one of the "special issues" that a Texas jury must unanimously answer affirmatively before a defendant may be sentenced to

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[1] Adam Liptak, *A Lawyer Known Best for Losing Capital Cases*, N.Y. Times, May 17, 2010, www.nytimes.com/2010/05/18/us/18bar.html?_r=0.

[2] *Id.*

death. *See* Tex. Code Crim. Proc. Ann. art. 37.071 § 2 (West 2013). Before trial, Dr. Quijano informed counsel that he viewed Mr. Buck as more likely to be dangerous in the future because he is Black. *Buck*, 132 S. Ct. at 33. Specifically, Dr. Quijano provided trial counsel with a report that identified the "Statistical Factors" he deemed relevant to future dangerousness, and the report stated, in no uncertain terms: "Race. Black. Increased probability." 3/8/97 Forensic Psychological Evaluation ("Rep.") at 7, *Buck v. Stephens*, No. 4:04-cv-03965 (S.D. Tex. June, 24 2005), ECF No. 5-118, p. 24; *Buck*, 132 S. Ct. at 33 (Statement of Alito, J.) (quoting report).

Even though this alleged link between race and future dangerousness had been proven false,[3] and notwithstanding the obvious harm that such testimony would cause Mr. Buck, trial counsel called Dr. Quijano to testify as an expert witness at Mr. Buck's sentencing. On direct examination, trial counsel specifically asked Dr. Quijano to recount the "statistical factors or environmental factors" that he used to assess the future dangerousness of a person "such as Mr. Buck." Sentencing Hr'g. Tr. ("Tr.") 110:2-7, May 6, 1997, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June, 24 2005), ECF No. 5-114, p.3. Dr. Quijano's answer tracked his report. He testified that race was among the "statistical factors in deciding whether a person will or will not constitute a continued danger," with Blacks and Hispanics more

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[3] *See, e.g.*, J. W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from the Epidemiologic Catchment Area Surveys*, 41 Hosp. & Comm. Psych., 761-770 (1990) (when controlling for socioeconomic status, correlations between race and violence disappear); J. Monahan et al., *Rethinking Risk Assessment: The MacArthur Study of Mental Disorder and Violence* (2001) (same).

likely to be dangerous because they are "over represented in the Criminal Justice System." *Id.* at 111:1-4, ECF No. 5-114, p.4). At trial counsel's request, and over the prosecution's objection, Dr. Quijano's report detailing that opinion was also admitted into evidence. *Id.* at 117:16-118:7, ECF No. 5-114, p. 10-11.

On cross-examination, the trial prosecutor exploited and compounded defense counsel's error by asking Dr. Quijano to reiterate his false and discriminatory "expert" opinion that Mr. Buck's race increased his likelihood of future dangerousness. Specifically, the prosecutor asked Dr. Quijano whether "the race factor, black, increases the future dangerousness for various complicated reasons." Dr. Quijano answered, "Yes." *Id.* at 160:8-15, ECF No. 5-115, p. 17. In closing argument, the prosecutor urged the jury to rely on Dr. Quijano to find that Mr. Buck was likely to commit criminal acts of violence in the future and that he was therefore eligible for a death sentence. *Id.* at 260:13-21 (ECF No. 5-117, p. 37).

During deliberations, the jury sent out three notes before deciding the appropriate sentence. In their third and final note, the jury requested the expert reports that had been submitted into evidence, including Dr. Quijano's report. See Jury Requests, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June, 24 2005), ECF No. 5-9, p. 4. After receiving these reports, the jury found that Mr. Buck was likely to be dangerous in the future, and he was sentenced to death.

C. Mr. Buck's State Habeas Proceedings

1. Mr. Buck's Initial Habeas Petition

In March of 1999, Mr. Buck filed his initial state habeas application, represented by newly-appointed counsel, Robin Norris. Like Mr. Buck's trial counsel, Mr. Buck's state habeas counsel had a history of deficient representation of death-sentenced prisoners. In another capital case, the CCA found that Mr. Norris threw his client "under the bus" by filing an initial state habeas application that was "only four pages long and merely state[d] factual and legal conclusions." *Ex parte Medina*, 361 S.W.3d 633, 635-36 (Tex. Crim. App. 2011). His representation of Mr. Buck was consistent with that troubling history.

State habeas counsel "filed only non-cognizable or frivolous claims in [Mr. Buck's] initial application." *Ex parte Buck*, 418 S.W.3d 98, 107 (Tex. Crim. App. 2013), *cert. denied*, 134 S. Ct. 2663 (2014). "[T]hree of the four claims . . . were raised and rejected on direct appeal and, therefore, under the longstanding precedent of [the CCA], those claims were not cognizable on a post-conviction writ of habeas corpus." *Id.* at 102. The fourth claim was "wholly frivolous" because it asserted that "applicant's trial counsel was ineffective for failing to request a jury instruction based on a non-existent provision of the penal code." *Id.* The application did not challenge any aspect of trial counsel's introduction of race as an aggravating factor into Mr. Buck's sentencing proceeding.

2. Texas Concedes Error.

In 2000, the Texas Attorney General conceded the unconstitutionality of Dr. Quijano's race-based future dangerousness testimony in the case of Victor Hugo Saldaño. *Saldaño v. State*, 70 S.W.3d 873, 875 (Tex. Crim. App. 2002) (quoting Pet. for Cert. at 3, *Saldaño v. Texas*, 530 U.S. 1212 (2000) (No. 99-8119)). Texas acknowledged that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice," and that the "infusion of race as a factor for the jury to weigh in making its determination violated [Mr. Saldaño's] constitutional right to be sentenced without regard to the color of his skin." Resp. to Pet. for Cert. at 7-8, *Saldaño v.* Texas, 530 U.S. 1212 (2000).

After its admission in *Saldaño*, then-Texas Attorney General, John Cornyn, announced that his office had conducted "a thorough audit" of capital cases—including a review of "case files for all executions since 1982"—and identified six cases, including Mr. Buck's, that also involved unconstitutional racially-biased testimony by Dr. Quijano.[4] The Attorney General's audit discovered equal protection violations in the cases of six death sentenced prisoners: Gustavo Garcia, Eugene Broxton, John Alba, Michael Gonzales, Carl Blue, and Duane Buck. In three of the cases (*Broxton*, *Gonzales*, and *Garcia*), the prosecution called Dr. Quijano as a witness; in the three others (*Alba*, *Blue*, and *Buck*), the defense

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[4] **Press Release, Office of the Tex. Att'y Gen., *U.S. Supreme Court Grants State's Motion in Capital Case* (June 5, 2000) (Rule 60(b) Mot. Ex. 3), *Buck*, No. 4:04-cv-03965 (S.D. Tex. Jan. 7 2014), ECF No. 49-1, p. 17; Press Release, Office of the Tex. Att'y Gen., *Statement from Attorney General John Cornyn Regarding Death Penalty Cases* (June 9, 2000) (Rule 60(b) Mot. Ex. 4), *Buck*, No. 4:04-cv-03965 (S.D. Tex. Jan. 7 2014), ECF No. 49-1, p. 19.**

called Dr. Quijano. *See* Mem. Op. & Order at 15-16, *Blue v. Johnson*, No. 4:99-cv-00350 (S.D. Tex. Sep. 29, 2000) (hereinafter, "*Blue* Opinion and Order").

The Attorney General declared that for the six identified cases, Texas "will not object if they seek to overturn the death sentences based on Mr. Quijano's testimony,"[5] because "it is inappropriate to allow race to be considered as a factor in our criminal justice system . . . ." Tex. Att'y Gen. Press Release, (Rule 60(b) Mot. Ex. 4), *Buck*, No. 4:04-cv-03965 (S.D. Tex. Jan, 7 2014), ECF No. 49-1, p. 19 (internal quotation marks omitted)). The Attorney General acknowledged that some of the six cases might still be in state proceedings and promised, "if and when those cases reach this office they will be handled in a similar manner as the *Saldaño* case."[6] Mr. Buck's case was the only one still in state court at the time of the Attorney General's June 2000 announcement.

Prior to the Attorney General's admission of error, none of the identified defendants had challenged the constitutionality of Dr. Quijano's testimony. Nonetheless, in all of the cases, except Mr. Buck's, the State kept its promise, waived all procedural defenses and conceded that Dr. Quijano's testimony violated equal protection, thus requiring a new sentencing hearing.[7]

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[5] Jim Yardley, *Racial Bias Found in Six More Capital Cases*, N.Y. Times, June 11, 2000, http://www.nytimes.com/2000/06/11/us/racial-bias-found-in-six-more-capital-cases.

[6] James Kimberly, *Death Penalties of 6 in Jeopardy: Attorney General Gives Result of Probe into Race Testimony*, Hous. Chron., June 10, 2000, at A1. In Texas, the district attorney of the county of conviction typically represents the State during state post-conviction proceedings.

[7] *See Blue* Opinion and Order at 15-17, *Blue v. Johnson*, No. 4:99-cv-00350 (S.D. Tex. Sept. 29, 2000), ECF No. 29; *Alba v. Johnson*, No. 00-40194, 2000 WL 1272983 at *1 (5th Cir. Aug. 21, 2000); Order at 1, *Alba v. Johnson*, No. 4:98-cv-221 (E.D. Tex. Sept. 25, 2000), ECF No. 31; Order at 1, *Garcia v. Johnson*, No. 1:99-cv-00134 (E.D. Tex. Sept. 7, 2000), ECF No. 36; Resp. to Suppl. Pet. and Confession of Error by TDCJ-ID, *Garcia*, No. 1:99-cv-00134 (E.D. Tex. Aug. 18, 2000), ECF No. 35;

D. Mr. Buck's Post-*Saldaño* State and Federal Habeas Proceedings

1. State Habeas Proceedings

Two years after the Texas Attorney General conceded error in Mr. Buck's case—and five years after the filing of his initial application for state habeas relief—Mr. Norris finally filed a second application for state habeas relief which, for the first time, challenged trial counsel's introduction of race as an aggravating factor into Mr. Buck's sentencing proceeding. Subsequent Appl. for Writ of Habeas Corpus, *Ex parte Buck*, No. WR-57,004-02 (Tex. Crim. App. Oct. 15, 2003), ECF No. 5-152, pp. 6, 9. In October 2003, the CCA denied Mr. Buck's initial state habeas application and dismissed the subsequent post-conviction application as an abuse of the writ without considering its merits. Order, *Ex parte Buck*, No. WR-57,004-02 (Tex. Crim. App. Oct. 15, 2003).

2. Federal Habeas Proceedings

In October of 2004, Mr. Buck, represented by new counsel, filed a federal habeas corpus petition in the District Court asserting, *inter alia*, that Mr. Buck's federal constitutional rights to equal protection, due process and the effective assistance of counsel were violated by the introduction of "expert" testimony and an "expert" report linking Mr. Buck's race to an increased likelihood of future dangerousness. Pet. for Writ of Habeas Corpus at 55-62, *Buck v. Cockrell*, No. 04-03965 (S.D.Tex. Oct. 14, 2004), ECF No. 1. Although Texas had promised to concede constitutional error and waive its procedural defenses in Mr. Buck's case—

Broxton v. Johnson, No. H-00-CV-1034, 2001 U.S. Dist. LEXIS 25715, at *15 (S.D. Tex. Mar. 28, 2001); Final J. at 1, *Gonzales v. Cockrell*, No. 7:99-cv-00072 (W.D. Tex. Dec. 19, 2002), ECF No. 84.

as it had in all of the other *Saldaño*-like cases, including two in which Dr. Quijano was a defense witness[8]—Texas reversed course, argued that federal review of Mr. Buck's ineffectiveness claim was foreclosed by state habeas counsel's default of that claim, and asserted, for the first time, that Mr. Buck's case "present[ed] a strikingly different scenario than that presented in *Saldaño*—Buck himself, not the State offered Dr. Quijano's testimony into evidence." Resp't Dretke's Answer and Mot. for Summ. J. with Br. in Support at 17, 21-25, *Buck v. Dretke*, No. 04-03965 (S.D. Tex. Sept. 6, 2005), ECF No. 6 (hereinafter, "Respondent's Answer"). Even though Texas's description of Mr. Buck's case was "obviously not accurate"—because "[l]ike Buck, the defendants in both *Blue* and *Alba* called Quijano to the stand"—Texas "created the unmistakable impression that Buck's case differed from the others in that only Buck called Quijano as a witness." *Buck*, 132 S. Ct. at 37 (Sotomayor, J., dissenting).

The District Court agreed with Texas, finding that Mr. Buck's Quijano-related claims were procedurally defaulted and that Mr. Buck was unable to demonstrate cause and prejudice or a fundamental miscarriage of justice to excuse the default. App. E at 17-18.

Between 2006 and 2012, Mr. Buck repeatedly, and unsuccessfully, sought review of the District Court's decision through the federal appellate courts. *See Buck v. Thaler*, 345 F. App'x 923 (5th Cir. 2009) (affirming denial of habeas relief due to procedural default and denying request for certificate of appealability); *Buck*

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[8] *See Blue* Opinion and Order at 15-17, *Blue*, No. 4:99-cv-00350 (S.D. Tex. Sep. 29, 2000), ECF No. 29; Order at 1, *Alba*, No. 4:98-cv-221 (E.D. Tex. Sept. 25, 2000), ECF No. 31.

v. Thaler, 559 U.S. 1072 (2010) (denying certiorari); *Buck v. Thaler*, 452 F. App'x 423 (5th Cir. 2011) (denying stay of execution and motion for relief from judgment); *In re Buck*, 132 S. Ct. 69 (2011) (granting stay of execution); *Buck*, 132 S. Ct. 32 (2011) (denying certiorari); *Buck v. Thaler*, 132 S. Ct. 1085 (2012) (denying rehearing). Because *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991), foreclosed federal review of Mr. Buck's IAC claims, Mr. Buck's appellate briefs did not challenge trial counsel's introduction of "expert" testimony and/or the "expert" report linking Mr. Buck's race to his likelihood of future dangerousness. For its part, Texas consistently asserted that Mr. Buck's trial counsel—rather than Texas—was responsible for placing Dr. Quijano's false and inflammatory opinion about race before the jury.[9] The Fifth Circuit agreed with Texas. *Buck*, 345 F. App'x at 930.

In 2011, three Justices of this Court reached the same conclusion. *Buck*, 132 S. Ct. 32. In response to a petition for certiorari that challenged the trial prosecutor's reliance on Dr. Quijano's testimony, Justice Alito, joined by Justices Scalia and Breyer, explained that responsibility for the introduction of "bizarre and objectionable" expert testimony linking Mr. Buck's race to an increased likelihood of future dangerousness "lay squarely with the defense." *Id.* at 33, 35. Justice Sotomayor, joined by Justice Kagan, dissented from the denial of certiorari, reasoning that "our criminal justice system should not tolerate" a "death sentence

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[9] Respondent's Answer at 17-18, 20 *Buck v. Drethe*, No. 04-03965 (S.D. Tex. Sept. 6, 2005); Thaler's Reply to Buck's Mot. for Relief from J. and Mot. for Stay of Execution at 10, 16-17, 19-20, *Buck v. Thaler*, 04-03965 (S.D. Tex. Sept. 9, 2011), ECF No. 30; Resp. in Opp'n to Appl. for Cert. of Appealability at 22-25, 28-30, *Buck v. Thaler*, No. 11-70025 (5th Cir. Sept. 14, 2011); Br. in Opp'n at 12-13, 18-20, *Buck v. Thaler*, Nos. 11-6391 & 11A297 (U.S. Sept. 15, 2011).

marred by racial overtones and a record compromised by misleading remarks and omissions made by the State of Texas in the federal habeas proceedings below." *Id.* at 35.

3. Mr. Buck's 2013 State Habeas Application and the *Trevino* Decision

In March 2013, Mr. Buck filed a new state habeas application. Application for Post-Conviction Writ of Habeas Corpus, *Ex parte Buck*, No. WR-57,004-03 (Tex. Crim. App. Mar. 28, 2013). Eight months later, a divided CCA dismissed Mr. Buck's Application for "fail[ing] to satisfy the requirements of Article 11.071, § 5(a)." 418 S.W.3d at 98. In dissent, Judge Alcala (joined by Judges Price and Johnson) noted:

> [Mr. Buck's case] reveals a chronicle of inadequate representation at every stage of the proceedings, the integrity of which is further called into question by the admission of racist and inflammatory testimony from an expert witness at the punishment phase. . . . As a result of prior habeas counsel's errors and the combined force of state and federal procedural-default laws, no Court has ever considered the merits of [Mr. Buck's] legitimate claims for post-conviction relief.

Ex parte Buck, 418 S.W.3d at 107.

While Mr. Buck's application was pending before the CCA, this Court announced, in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), that *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), was applicable to Texas. *Martinez* "'modif[ied] the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default.'" *Trevino*, 133 S. Ct. at 1917 (quoting *Martinez*, 132 S. Ct. at 1315). Together, *Martinez* and *Trevino* allow, for the first time, an opportunity for federal court

review of defaulted IAC claims where (1) the claim is "substantial"; (2) there was no counsel or ineffective counsel during the initial state post-conviction review; and (3) state law effectively requires ineffective assistance of trial counsel claims to be litigated on initial collateral review, as it does in Texas. *Id.* at 1918 (quoting *Martinez*, 132 S. Ct. at 1318-20). A "substantial" claim is one that "has some merit." *Martinez*, 132 S. Ct. at 1318 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for COA to issue)).

E. Mr. Buck's Post-*Trevino* Federal Habeas Proceedings

On January 7, 2014, Mr. Buck filed a motion for relief from the District Court's denial of the ineffective assistance of counsel claim that Mr. Buck raised in his initial federal habeas corpus petition. Rule 60(b)(6) Motion, *Buck v. Stephens*, No. 04-03965 (S.D.Tex. Jan. 7, 2014), ECF No. 49. Mr. Buck detailed eleven facts and circumstances demonstrating the "'extraordinary circumstances' justifying the reopening of a final judgment" under Rule 60(b)(6). *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). Specifically:

1. Mr. Buck's trial attorney knowingly presented expert testimony to the sentencing jury that Mr. Buck's race made him more likely to be a future danger;

2. Although required to act as gate-keeper to prevent unreliable expert opinions from reaching and influencing a jury, *see* Tex. R. Evid. 705(c); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992), the trial court qualified Dr. Quijano as an expert on predictions of future dangerousness, allowed him to present race based opinion testimony to Mr. Buck's capital sentencing jury, and admitted Dr. Quijano's excludable hearsay report linking race to dangerousness;

3. The trial prosecutor intentionally elicited Dr. Quijano's testimony that Mr. Buck's race made him more likely to be a future danger on cross-examination, vouched for him as an "expert" in closing, and asked the jury to rely on Dr. Quijano's testimony to answer the future dangerousness special issue in the State's favor;

4. Mr. Buck's state habeas counsel did not challenge trial counsel's introduction of this false and offensive testimony—or Texas's reliance on it—in Mr. Buck's initial state habeas application;

5. The Texas Attorney General conceded constitutional error in Mr. Buck's case and promised to ensure that he received a new sentencing, but reneged on that promise after deciding that the introduction of the offensive testimony was trial counsel's fault;

6. [The District Court had previously] ruled that federal review of Mr. Buck's trial counsel ineffectiveness claim was foreclosed by state habeas counsel's failure to raise and litigate the issue in Mr. Buck's initial state habeas petition, relying on *Coleman*, which has subsequently been modified by *Martinez* and *Trevino*;

7. The Fifth Circuit held Mr. Buck's trial counsel responsible for the introduction of Dr. Quijano's testimony linking Mr. Buck's race to his likelihood of future dangerousness;

8. Three Supreme Court Justices concluded that trial counsel was at fault for the introduction of Dr. Quijano's testimony;

9. Three Judges of the CCA found that "because [Mr. Buck's] initial habeas counsel failed to include any claims related to Quijano's testimony in his original [state habeas] application, no court, state or federal, has ever considered the merits of those claims," *Ex parte Buck*, 418 S.W.3d at 104;

10. Mr. Buck's case is the only one in which Texas has broken its promise to waive procedural defenses and concede error, leaving Mr. Buck as the only individual in Texas facing execution without having been afforded a fair and unbiased sentencing hearing; and

11. *Martinez* and *Trevino* now allow for federal court review of "substantial" defaulted claims of trial counsel ineffectiveness.

Rule 60(b)(6) Motion at 15-17, *Buck*, No. 04-03965 (S.D.Tex. Jan. 7, 2014), ECF No. 49.

In adjudicating this Rule 60(b) motion, the District Court recognized that Mr. Buck's trial counsel's performance was constitutionally deficient. The court explained that, by calling Dr. Quijano as an expert witness, trial counsel "recklessly exposed his client to the risks of racial prejudice and introduced testimony that was contrary to his client's interests." App. D at 14. Remarkably, the court nonetheless concluded that trial counsel's introduction of this "expert" race-as-dangerousness evidence had only a "*de minimis*" effect on Mr. Buck's sentencing proceeding. App. D at 10. As a result, the court found that Mr. Buck was not prejudiced by his counsel's deficient performance, and that his case is not extraordinary within the meaning of Rule 60(b). App. D at 10.; *see also* App. C at 3. The District Court also denied a COA. App. D at 14-15.

Mr. Buck filed an application for a COA with the Fifth Circuit. With respect to *Strickland* prejudice, Mr. Buck showed that, far from being "*de minimis*," testimony from a purported "defense expert" that a defendant is more likely to be dangerous in the future because of his race is uniquely prejudicial—especially in the context of a capital sentencing proceeding, given "the range of discretion entrusted to a jury," and the fact that a "juror who believes that blacks are violence prone . . . might well be influenced by that belief in deciding" whether to impose the death penalty. *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion).

Mr. Buck's demonstration of prejudice in his case is especially clear because the State's evidence of future dangerousness was far from overwhelming. Indeed, another defense expert, Dr. Patrick Lawrence, testified that Mr. Buck's records showed that he "did not present any problems in the prison setting" and that he had been held in minimum custody. *See* Tr. 196, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June 24, 2005), ECF No. 5-116, pp. 13. Dr. Lawrence, who had previously evaluated roughly 900 prisoners convicted of homicide, and found that many were likely to be dangerous in the future, concluded and testified that Mr. Buck was not likely to commit criminal acts of violence in the future. *See* Tr. 177, 182-186, 188-204, 205-06, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June 24, 2005) ECF Nos. 5-115, pp. 34, 39-41; 5-116, pp. 2-3, 22-23; 5-116, pp. 5-21. Moreover, the jury reached a sentencing decision only after substantial deliberations, which included sending three notes to the court—the third of which requested the "expert" reports, including Dr. Quijano's. *See* Jury Requests, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June 24 2005), ECF No. 5-9, pp. 1-4. The Fifth Circuit neither disputed these points, nor approved of the District Court's analysis under *Strickland*'s prejudice prong.

Despite Mr. Buck's showing of prejudice in his case, the Fifth Circuit denied Mr. Buck's application because it concluded that Mr. "Buck has not made out even a minimal showing that his case is exceptional," within the meaning of Rule 60(b). App. B at 7. Mr. Buck sought *en banc* review of the panel's decision but, over the dissent of Judge Dennis, his application was denied. App. A. Judge Dennis, joined by Judge Graves, explained that a COA clearly should have issued, and that the

panel's contrary decision was consistent with the Fifth Circuit's "'troubling' habit of evaluating the merits of petitioners' [COA application] claims." *Id.* at 3 (quoting *Jordan v. Fisher*, 135 S. Ct. 2647, 2652 n.2 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from the denial of certiorari)). Judge Dennis observed that "[r]ather than consider whether reasonable jurists could disagree with the district court and conclude that Buck's allegations 'set up an extraordinary situation,' the panel went through the factors one by one and determined that each was 'not extraordinary.'" *Id.* at 4 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). He further explained that the panel "'dismisse[d], miscast[], and minimize[d] [Mr. Buck's] evidence, diluting its full weight by disaggregating it and focusing the inquiry on determining whether each isolated piece of evidence, taken alone,' proves extraordinary circumstances." *Id.* (citation omitted). By contrast, "[a] proper threshold inquiry into Buck's claim would have revealed that reasonable jurists could disagree with the district court's conclusions," because the factors presented by Mr. Buck "describe a situation that is at least debatably 'extraordinary.'" *Id.* Judge Dennis noted that this conclusion is confirmed by the fact that—even before Mr. Buck was permitted to present his IAC claim—Justice Sotomayor, joined by Justice Kagan, found that Mr. Buck's case "'presented issues that 'deserve encouragement to proceed further.'" App. A at 6 (quoting *Buck*, 132 S. Ct. at 28 (internal citation omitted)).

REASONS FOR GRANTING THE WRIT

The panel's decision contravened this Court's precedent and deepened two circuit splits in a case raising an issue of national significance: whether the criminal justice system will tolerate a death sentence that is imposed after the introduction of "defense expert" testimony and a "defense expert" report unequivocally stating that the defendant is more likely to be dangerous in the future—the critical issue in determining his eligibility for death—because he is Black.

This Court has repeatedly stressed that racial discrimination in the administration of justice is exceptional, and that courts must be particularly vigilant about eliminating it in capital cases. Disregarding this settled precedent, the Fifth Circuit concluded that Mr. Buck "has not made out even a minimal showing that his case is exceptional," and that trial counsel's needless decision to inject "expert" evidence that Mr. Buck was more deserving of a death sentence because he is Black is "unremarkable as far as IAC claims go." App. B at 9. But the nature and consequence of trial counsel's presentation of this "expert" evidence is different in kind than the errors committed by counsel in almost any other ineffectiveness case. This is not a case where, for example, trial counsel failed to investigate mitigating evidence that might provide a basis for a sentence less than death. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510 (2003). Instead, this is a case where, as the District Court found, Mr. Buck's trial counsel "recklessly exposed his client to the risks of racial prejudice" and "len[t] credence to any potential latent

racial prejudice held by the jury." App. D at 14. Because the injection of racial discrimination into the judicial process "poisons public confidence in the evenhanded administration of justice," *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015), the patently deficient performance of Mr. Buck's trial counsel not only undermines confidence in Mr. Buck's death sentence, it undermines confidence in the criminal justice system as a whole.

It is precisely for this reason that Texas conceded error and promised six identified prisoners—including Mr. Buck—that it would not object or interpose procedural defenses if they sought to obtain new sentencing proceedings. Texas kept its promise to every single one of those prisoners, except Mr. Buck.

Then, in 2011, two opinions, reflecting the opinions of five Justices of this Court, underscored the exceptional nature of Mr. Buck's case. Justice Alito, joined by Justices Scalia and Breyer, explained that "[t]he petition in this case concerns bizarre and objectionable testimony given by a 'defense expert' at the penalty phase of Buck's capital trial." *Buck*, 132 S. Ct. at 33. Justice Alito concluded that Mr. Buck's certiorari petition—which then raised only a prosecutorial misconduct claim—should be denied because defense counsel, rather than the prosecution, was responsible for injecting race into the proceeding. *See id.* at 33, 35. Justice Sotomayor, joined by Justice Kagan, dissented from the denial of certiorari, stressing that Mr. Buck's death sentence is "marred by racial overtones," which "our criminal justice system should not tolerate . . . especially in a capital case." *Id.* at 35.

For all of these reasons, Mr. Buck's case is extraordinary under any conceivable understanding of the word and the panel's decision to the contrary is wrong under any standard of review. Further, in denying Mr. Buck a COA, the decision below continues the Fifth Circuit's "troubling" pattern of failing to follow this Court's COA precedent. *Jordan*, 135 S. Ct. at 2652 n.2 (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari). Indeed, a review of capital § 2254 cases over the last five years shows that in 59% of cases arising out the Fifth Circuit, a COA was denied by both the district court and Court of Appeals on all claims. By contrast, during that same period, only 6.25% cases arising out of the Eleventh Circuit and 0% of cases arising out of the Fourth Circuit have had a COA denied on all claims.

For all these reasons, and those discussed more fully herein, certiorari should be granted.

I. Certiorari Should Be Granted Because Reasonable Jurists Could Unquestionably Debate The Extraordinariness of The Circumstances Identified by Mr. Buck.

This Court's precedent is clear: a COA involves only a threshold analysis and preserves full appellate review of potentially meritorious claims. Thus, "a prisoner seeking a COA need only demonstrate 'a substantial showing'" that the district court erred in denying relief. *Miller-El*, 537 U.S. at 327 (quoting *Slack v. McDaniel*, 529 U.S. at 473, 484 (2000) and 28 U.S.C. § 2253(c)(2)). This "threshold inquiry" is satisfied so long as reasonable jurists could either disagree with the district court's decision or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327, 336. A COA is not contingent upon proof "that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

In sum, the touchstone is "the debatability of the underlying constitutional claim [or procedural issue], not the resolution of that debate." *Id.* at 342; *see also id.* at 348 (Scalia, J., concurring) (recognizing that a COA is required when the district court's denial of relief is not "undebatable"). Applying this standard in *Miller-El*, this Court reversed the Fifth Circuit's denial of a COA in a jury discrimination case, and explained that "a COA can be supported by <u>any evidence</u> demonstrating that, despite the neutral explanation of the prosecution, the peremptory strikes in the final analysis were race based." *Id.* at 340 (emphasis added).

As explained in detail above, Mr. Buck's Rule 60(b) application pled numerous exceptional circumstances, which, as summarized by Judge Dennis's dissent from the denial of rehearing *en banc*, include the following:

- Mr. Buck "faces execution based on a capital sentencing proceeding whose reliability was fundamentally compromised by the race-based testimony of Dr. Walter Quijano";
- The "State of Texas identified his case as one of six that was 'similar' to that of Victor Hugo Saldaño, in which the State admitted that Dr. Quijano's testimony and the resulting 'infusion of race as a factor for the jury to weigh in making its determination violated [Mr. Saldaño's] constitutional right to be sentenced without regard to the color of his skin'";
- The "procedural default that barred [Mr. Buck's] present [ineffective assistance of counsel] claim should have been waived by the State pursuant to representations made by the Texas Attorney General";
- "[F]ollowing the Supreme Court's decisions in *Martinez* . . . and *Trevino* . . ., the same procedural default would not bar his claim if it were brought in federal court for the first time today";
- Three Judges on the Texas Court of Criminal Appeals dissented from that court's dismissal of Mr. Buck's successor state habeas petition, noting "'[t]he record in this case reveals a chronicle of inadequate representation at every stage of the proceedings, the integrity of which is further called into question by the admission of racist and inflammatory testimony from an expert witness at the punishment phase'"; and
- Even when considering solely Mr. Buck's prosecutorial misconduct claim, Justice Sotomayor concluded that, "[e]specially in light of the capital nature of this case and the express recognition by a Texas attorney general that the relevant testimony was inappropriately race-charged, Buck has presented issues that 'deserve encouragement to proceed further.'"

App. A at 5-6. (internal quotations and citations omitted).

As Judge Dennis recognized, these facts and circumstances, at a minimum, make the threshold showing that requires a COA. App. A at 6. The panel's

contrary conclusion—that Mr. "Buck has not made out even a minimal showing that his case is exceptional," within the meaning of Rule 60(b), App. B at 7—is a direct product of its failure to adhere to this Court's precedent. Instead of assessing the debatability of the District Court's opinion, the panel improperly rejected Mr. Buck's ineffectiveness claim on its merits; instead of engaging in the comprehensive, equitable analysis required by Rule 60(b), the panel isolated and disregarded critical aspects of Mr. Buck's case; and instead of acknowledging the unique harm caused by the injection of racial bias and discrimination into Mr. Buck's capital sentencing proceedings, the panel ignored it. Certiorari is warranted.

A. The Panel Improperly Sidestepped the COA Process by Denying Relief Based on its View of the Merits.

In reviewing the facts and circumstances of Mr. Buck's case, the Fifth Circuit panel "pa[id] lipservice to the principles guiding issuance of a COA," *Tennard v. Dretke*, 542 U.S. 274, 283 (2004), but actually held Mr. Buck to a far more onerous standard. Specifically, the panel "sidestep[ped the threshold COA] process by first deciding the merits of [Mr. Buck's] appeal, and then justifying its denial of a COA based on its adjudication of the actual merits," thereby "in essence deciding an appeal without jurisdiction." *Miller-El*, 537 U.S. at 336-37; *see* App. A at 2 (Dennis, J., dissenting).

As this Court stressed in *Miller-El*, the threshold nature of the COA inquiry "would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail."

Miller-El, 537 U.S. at 337. Yet that is precisely what the panel did here. In Judge Dennis's words:

> Rather than consider whether reasonable jurists could disagree with the district court and conclude that Buck's allegations "set up an extraordinary situation," *Ackermann v. United States*, 340 U.S. 193, 199 (1950), the panel went through the factors one by one and determined that each was "not extraordinary." *Buck*, Slip Op. at 9-10. At the end of this flawed analysis of the merits of Buck's claims, the panel conclusorily declared: "Jurists of reason would not debate that Buck has failed to show extraordinary circumstances justifying relief." *Id.* at 10.

App. A at 4; *cf. Harrington v. Richter*, 562 U.S. 86, 101 (2011) (noting the court of appeals failed to apply the proper AEDPA standard when it "conducted a de novo review" and then "declared, without further explanation," that the state court's contrary conclusion was unreasonable).

The panel impermissibly sidestepped the COA inquiry in this manner by denying relief because, in its view: (1) Mr. Buck's IAC claim is "unremarkable"; and (2) the "broken-promise element to this case makes it odd and factually unusual" but not extraordinary within the meaning of Rule 60(b). App. B at 9-10. These statements reflect the panel's (profoundly wrong) assessment of the merits of Mr. Buck's Rule 60(b) motion and complete departure from the proper COA analysis. The panel's sole inquiry should have been whether a reasonable jurist could conclude that Mr. Buck's IAC claim is remarkable, or that Texas's broken promise is not just "odd and factually unusual," but extraordinary.[10]

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[10] The panel also stated that Mr. Buck has not "established that the AG's office promised not to raise procedural defenses in Buck's case," *Buck*, App. B at 3 n.1, but the Attorney General's own press releases—which specifically named Mr. Buck—and the AG's statements to the media make its commitment to Mr. Buck abundantly clear. *See* n.4, *supra*. Furthermore, any questions about

The Fifth Circuit's failure to apply the proper COA standard in this case is not an isolated error. This Court has twice corrected the Fifth Circuit's unduly restrictive approach to granting COAs. *See Tennard*, 542 U.S. at 283; *Miller-El*, 537 U.S. at 327. And just last Term, three Justices noted that the Fifth Circuit continues its "troubling" pattern of failing to apply the threshold COA standard required by this Court's precedent. *Jordan*, 135 S. Ct. at 2652 n.2 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari).

The Fifth Circuit's troubling pattern has resulted in a demonstrable circuit split with respect to the application of the COA standard. As described in Appendix F, a review of electronically available capital § 2254 cases in the Fifth Circuit and two other nearby circuits (the Fourth and Eleventh) in the last five years, demonstrates a dramatic difference among the three circuits. In the Fifth Circuit, a COA was denied on all claims by both the district court and the court of appeals 59% of the time. By contrast, during that same period, a COA was denied on all claims by both the district court and court of appeals in only 6.25% of capital § 2254 cases in the Eleventh Circuit and 0% of such cases in the Fourth Circuit. *See* App. F. This stark disparity quantifiably demonstrates that the Fifth Circuit's application of the COA standard is significantly different from, and more burdensome than, that of the Fourth and Eleventh Circuits, which are more consistent with one another.

Mr. Buck's evidence are properly addressed at an evidentiary hearing. They certainly do not justify the denial of relief (much less a COA) without a hearing.

B. The Panel Failed to Undertake the Equitable Rule 60(b) Inquiry Mandated by this Court's Precedent.

The panel also disregarded this Court's precedent establishing that Rule 60(b) is an equitable remedy, which "provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863-64 (1988) (quoting *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949)). As with any equitable standard where the touchstone is accomplishing justice, a court must "examine all of the circumstances" to determine whether "collectively [they establish] extraordinary circumstances for purposes of Rule 60(b)(6)." *Ramirez v. United States*, 799 F.3d 845, 851 (7th Cir. 2015); *see Klapprott*, 335 U.S. at 615 (analyzing circumstances collectively in concluding that reopening the judgment was appropriate under Rule 60(b)).

Instead of following this equitable, holistic approach, the Fifth Circuit panel in this case "went through the factors one by one, and determined that each was 'not extraordinary'"; and, in so doing, it improperly "dilut[ed] [the] full weight" of the circumstances identified by Mr. Buck. App. A at 4 (Dennis, J., dissenting). For example, the panel deemed it irrelevant that Mr. Buck's habeas petition was denied without review of his IAC claim because "it is the nature of procedural defaults that many potentially viable claims will never advance to a merits determination." App. B at 9. Similarly, the panel concluded that this Court's intervening decisions in *Martinez* and *Trevino*, which would allow merits review of Mr. Buck's IAC claim,

were of no consequence because "'a change in decisional law' . . . is not an extraordinary circumstance under Rule 60(b)(6)." App. B at 9 (citation omitted).

By isolating, and then categorically discounting, these circumstances, the Fifth Circuit failed to undertake the equitable, case-specific analysis mandated by this Court's precedent. As a preliminary matter, a "prisoner's inability to present a claim of trial error [for merits review] is of particular concern when the claim is one of ineffective assistance of counsel," because the "right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Martinez*, 132 S. Ct. 1317. Moreover, this case does not involve an ordinary IAC claim. If it is a matter of "particular concern" whenever an IAC claim is defaulted, *id.*, it is a matter of far graver concern where—as here—trial counsel's ineffectiveness caused the "the admission of racist and inflammatory testimony from an expert witness at the punishment phase," *Ex parte Buck*, 418 S.W.3d at 98 (Alcala, J., joined by Price and Johnson, JJ., dissenting), and undermined the integrity of both the petitioner's death sentence and the criminal justice system overall. Yet, the Fifth Circuit panel failed to consider the extraordinary circumstances identified by Mr. Buck and improperly treated Mr. Buck's case like any other involving a procedural default and change in decisional law.

The Fifth Circuit's analysis is not only inconsistent with this Court's precedent, it also deepens a circuit split concerning the proper application of Rule 60(b) post-*Martinez*. The Fifth and Eleventh Circuits have categorically concluded that *Martinez*'s change in decisional law is not an extraordinary circumstance for

purposes of Rule 60(b). *See Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012); *Hamilton v. Sec'y, Florida Dep't of Corrections*, 793 F.3d 1261, 1266 (11th Cir. 2015) (noting split with Third Circuit).[11] By contrast, the Third and Seventh Circuits have held that *Martinez* is relevant and must be considered along with all of the equitable factors identified by the petitioner to determine whether Rule 60(b) relief is warranted. The Court in *Cox v. Horn*, 757 F.3d 113, 122 (3d Cir. 2014), explained that the Fifth Circuit's categorical approach fails "to consider the full set of facts and circumstances attendant to the Rule 60(b)(6) motion under review," and is thereby inconsistent with the "flexible, multifactor approach . . . that takes into account all the particulars of a movant's case," as required by Rule 60(b).[12] *Accord Ramirez*, 799 F.3d at 850 (expressly agreeing with *Cox*). *Cox* further held that the district court abused its discretion by relying on the categorical approach, without "consider[ing] how, if at all, the capital aspect of this case or any other factor highlighted by the parties would figure into its 60(b)(6) analysis." *Cox*, 757 F.3d at 124.

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[11] Although the panel below did not decide whether other equitable factors can be relevant in habeas cases under Rule 60(b), the panel expressly reiterated prior Fifth Circuit precedent holding that the change in decisional law caused by *Martinez* is not. App. B at 9.

[12] The Third Circuit further explained that the categorical approach is not authorized by this Court's decision in *Gonzalez*, 545 U.S. at 524. Instead, "*Gonzalez* merely highlights, in action, the position of both the Supreme Court and this Court that '[i]ntervening developments in the law by themselves *rarely* constitute the extraordinary circumstances required for relief under Rule 60(b)(6).' And, to be clear, the *Gonzalez* Court examined the individual circumstances of the petitioner's case to see whether relief was appropriate. ." *Cox*, at 757 F.3d at 123 (emphasis in *Cox*) (citations omitted).

C. The Fifth Circuit Disregarded the Special Harm Caused By Racial Discrimination Infecting the Administration of Justice.

In its decision denying Mr. Buck a COA, the panel repeated an error that this Court corrected in *Miller-El*, *viz.*, denying a COA by failing to "give full consideration to the substantial evidence" presented by the habeas petitioner. *Miller-El*, 537 U.S. at 341. As Judge Dennis explained: "like the 'dismissive and strained interpretation' of a petitioner's evidence that was rejected by the Supreme Court" in *Miller-El*, the panel's opinion in Mr. Buck's case "'dismisses, miscasts, and minimizes Buck's evidence.'" App. A at 4 (citation omitted). As a result, the panel treated this exceptional case—which involves express racial bias at a capital sentencing hearing—as if it were an ordinary habeas petition.

As discussed, the panel declared that "Buck's IAC claim . . . is at least unremarkable as far as IAC claims go." App. B at 9. The only way that the panel could have reached such a patently incorrect conclusion is by disregarding the facts at the heart of Mr. Buck's case. To reiterate, Mr. Buck's claim is that his trial counsel unreasonably presented the sentencing jury with evidence from a psychologist, who was stamped with the trial court's imprimatur as an expert, that Mr. Buck was more likely to be dangerous in the future—the critical question that would determine whether Duane Buck would receive a death sentence—because he is Black. Yet, the panel did not even mention race in the portions of its opinion concluding (a) that Mr. Buck's IAC claim was "unremarkable," and (b) that the circumstances identified by Mr. Buck were "not extraordinary at all in the habeas context." App. B at 9.

The panel's error on this point is a fundamental one, which requires this Court's review. "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). Despite the constitutional prohibition on such discrimination, "'it is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors.'" *Miller-El v Dretke*, 545 U.S. 231, 237 (2005) (citation omitted). The risk that racial discrimination will taint criminal trials is especially pronounced in capital sentencing proceedings: "Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Turner*, 476 U.S. at 35 (plurality opinion). And the risk is greater still where, as here, future dangerousness is at issue: "a juror who believes that blacks are violence prone . . . might well be influenced by that belief" in deciding whether to impose death. *Id.* Moreover, when racial discrimination infects a criminal trial, the injury is not simply to the defendant, it is "to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Rose*, 443 U.S. at 556.

Mr. Buck's ineffective assistance of counsel claim—unlike an ordinary IAC claim—thus implicates "public confidence in the evenhanded administration of justice." *Davis*, 135 S. Ct. at 2208. It bears repeating that, despite this Court's "'unceasing efforts' to eradicate racial prejudice from our criminal justice system" (especially in capital cases), *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987), the jury

that decided whether Mr. Buck would live or die was presented with testimony from a "defense expert" that he was more likely to be dangerous in the future—the key issue concerning his eligibility for a death sentence—because he is Black.

The fact that Mr. Buck's trial counsel injected an explicit appeal to racial bias, fear and stereotype into the sentencing proceedings establishes that Mr. Buck's ineffectiveness claim, and, indeed, his case overall, is extraordinary. It is for that reason that Texas promised to concede error and waive its procedural defenses in Mr. Buck's case, and others like it. As Texas told this Court in *Saldaño*, "the use of race in [a capital] sentence seriously undermine[s] the fairness, integrity, or public reputation of the judicial process." Tex.'s Resp. to Pet. for Cert., *Saldaño v. Texas*, No. 99-8119 (U.S. May 3, 2000). That principle is as true for Mr. Buck's case as it was for *Saldaño*.

And the fact that Texas kept its promise in every case except Mr. Buck's makes his case even more extraordinary. The Fifth Circuit panel acknowledged that the "broken-promise element to this case makes it odd and factually unusual," but concluded that it was irrelevant because "extraordinary circumstances are not merely found on the spectrum of common circumstances to unique circumstances." App. B at 10. The panel cited no support for this *ipse dixit*, and failed to acknowledge that the difference, if any, between an "odd and factually unusual" circumstance and an "extraordinary" circumstance is precisely the kind of issue that could be debated by reasonable jurists.

Moreover, the panel's conclusion once again disregards the core of why this case is exceptional. Texas not only promised to concede error and waive procedural defenses and then reneged on its promise; Texas promised to concede error and waive procedural defenses because it recognized that doing so was necessary to protect the "integrity or public reputation" of the criminal justice system, and then reneged on its promise. Tex.'s Resp. to Pet. for Cert., *Saldaño*, No. 99-8119 (U.S. May 3, 2000). Thus, contrary to the panel's conclusion, *see* App. B at 10, whether or not Mr. Buck detrimentally relied on Texas's promise is irrelevant. Texas's broken promise is an extraordinary circumstance "'justifying relief from the judgment'" because Texas itself recognized that making such a promise was necessary to uphold the integrity of the courts.

CONCLUSION

For all of the foregoing reasons, Mr. Buck's case is extraordinary. At a minimum, reasonable jurists could so conclude, which means a COA must issue. This Court's review is warranted not only to resolve two circuit splits, but to maintain public confidence that courts will not permit an execution tainted by "expert" testimony explicitly linking race to dangerousness.

Respectfully submitted,

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Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-70030

United States Court of Appeals
Fifth Circuit
FILED
November 6, 2015
Lyle W. Cayce
Clerk

DUANE EDWARD BUCK,

Petitioner–Appellant,

versus

WILLIAM STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent–Appellee.

Appeals from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC
(Opinion August 20, 2015, 2015 U.S. App. LEXIS 14755)

Before SMITH, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor

(FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

In the en banc poll, 2 judges voted in favor of rehearing (Judges Dennis and Graves), and 13 judges voted against rehearing (Chief Judge Stewart and Judges Jolly, Davis, Jones, Smith, Clement, Prado, Owen, Elrod, Southwick, Haynes, Higginson, and Costa).

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

* * * * * * *

JAMES L. DENNIS, Circuit Judge, with whom GRAVES, Circuit Judge, joins, dissenting:

In *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003), the Supreme Court held that the threshold inquiry required by 28 U.S.C. § 2253(c):

> does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

In my view, the panel in this case, perhaps unintentionally, followed that prohibited side-stepping process by justifying its denial of a COA based on its adjudication of the actual merits. This is not the first time that a panel of this

court has flouted *Miller-El*'s clear command when denying a COA: our court's "troubling" habit of evaluating the merits of petitioners' claims has been noted by three Supreme Court justices. *See Jordan v. Fisher*, 135 S. Ct. 2647, 2652 n.2 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari). Because I believe that Buck has made the requisite threshold showing of entitlement to relief, I respectfully dissent from the refusal to rehear his case en banc.

Duane Buck, a capital prisoner, seeks to raise ineffective assistance of counsel in federal habeas corpus proceedings. His habeas petition was denied by the district court as procedurally barred. Buck has now applied to this court for a COA to challenge the district court's denial of his second motion for relief from judgment under Rule 60 of the Federal Rules of Civil Procedure, in which he alleged that extraordinary circumstances warrant reopening the proceedings. Under *Slack v. McDaniel*, 429 U.S. 473, 484 (2000), a COA should issue in Buck's case if he shows (1) that jurists of reason would find debatable "whether the petition states a valid claim of the denial of a constitutional right" and (2) that those jurists "would find it debatable whether the district court was correct in its procedural ruling." Yet the panel denied Buck's application on the grounds that "he has not shown extraordinary circumstances that would permit relief under Federal Rule of Civil Procedure 60(b)(6)." *Buck v. Stephens*, Slip Op. at 1 (Aug. 20, 2015). By ruling on the merits, the panel contravened the Supreme Court's clear commands and improperly denied Buck his right to appeal.

In *Miller-El*, the Supreme Court reiterated that, when evaluating a COA application, "the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims." 537 U.S. at 326. A petitioner is not required to demonstrate that he is entitled to relief; in fact,

"[i]t is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief." *Id.* at 337. Rather, a petitioner satisfies the *Slack* standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327 (emphasis added). Furthermore, under this court's established precedent, "any doubt as to whether a COA should issue in a death-penalty case must be resolved in favor of the petitioner." *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005) (citing *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004) (per curiam); *Newton v. Dretke*, 371 F.3d 250, 254 (5th Cir. 2004)).

In his application, Buck presented eleven factors that, when considered together, he believes demonstrate that his case involved extraordinary circumstances. Rather than consider whether reasonable jurists could disagree with the district court and conclude that Buck's allegations "set up an extraordinary situation," *Ackermann v. United States*, 340 U.S. 193, 199, (1950), the panel went through the factors one by one and determined that each was "not extraordinary." *Buck*, Slip Op. at 9-10. At the end of this flawed analysis of the merits of Buck's claims, the panel conclusorily declared: "Jurists of reason would not debate that Buck has failed to show extraordinary circumstances justifying relief." *Id.* at 10. This analysis would not be sufficient even if the court were properly considering the merits of Buck's claims: like the "dismissive and strained interpretation" of a petitioner's evidence that was rejected by the Supreme Court first in *Miller-El*, 537 U.S. at 344, and then again in *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005), the panel "dismisses, miscasts, and minimizes [Buck's] evidence, diluting its full weight by disaggregating it and focusing the inquiry on determining whether each

Appeals dissented from the dismissal of his state habeas petition as procedurally barred, concluding that "[t]he record in this case reveals a chronicle of inadequate representation at every stage of the proceedings, the integrity of which is further called into question by the admission of racist and inflammatory testimony from an expert witness at the punishment phase" and that the procedural barrier should therefore be abrogated. *Ex parte Buck*, 418 S.W.3d 98 (Tex. Crim. App. 2013) (Alcala, J., dissenting), *cert. denied sub nom. Buck v. Texas*, 134 S. Ct. 2663 (2014). While each of these factors might, on its own, be insufficient to warrant relief, together they describe a situation that is at least debatably "extraordinary."

That the issue is at least debatable is further illustrated by Justice Sotomayor's dissent from the denial of certiorari in *Buck v. Thaler*, 452 F. App'x 423 (5th Cir. 2011), a previous iteration of this case. Justice Sotomayor—joined by Justice Kagan—concluded that, "[e]specially in light of the capital nature of this case and the express recognition by a Texas attorney general that the relevant testimony was inappropriately race-charged, Buck has presented issues that 'deserve encouragement to proceed further'" and a COA should therefore have been granted. *Buck v. Thaler*, 132 S. Ct. 32, 38 (2011) (quoting *Miller-El*, 537 U.S. at 327).

"Any doubt regarding whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination." *Newton*, 371 F.3d at 254 (5th Cir. 2004). In a case involving the severest of penalties, the panel's summary conclusion that "[j]urists of reason would not debate that Buck has failed to show extraordinary circumstances justifying relief" was both inappropriate and incorrect.

I respectfully dissent.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

November 06, 2015

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 14-70030 Duane Buck v. William Stephens, Director
USDC No. 4:04-CV-3965

Enclosed is an order on Petitions for Rehearing and Rehearing En Banc entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Joseph M. Armato, Deputy Clerk

Ms. Katherine Cooper Black
Mr. David J. Bradley
Ms. Fredericka Searle Sargent
Mr. Samuel Spital
Ms. Christina A. Swarns

Appendix B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
August 20, 2015
Lyle W. Cayce
Clerk

No. 14-70030

DUANE EDWARD BUCK,

Petitioner–Appellant,

versus

WILLIAM STEPHENS, Director,
Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent–Appellee.

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:04-CV-3965

Before SMITH, OWEN, and HAYNES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Duane Buck seeks a certificate of appealability ("COA") to challenge the denial of his motion for reconsideration, in which he sought to raise ineffective assistance of counsel ("IAC") in seeking federal habeas corpus relief. Because he has not shown extraordinary circumstances that would permit relief under

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Federal Rule of Civil Procedure 60(b)(6), we deny the application for a COA.

I.

This is Buck's third trip to the Fifth Circuit. More detailed explanations of the facts and procedural history can be found in *Buck v. Thaler*, 345 F. App'x 923 (5th Cir. 2009) (per curiam), and *Buck v. Thaler*, 452 F. App'x 423 (5th Cir. 2011) (per curiam). We recite only what is relevant to this request for a COA.

In July 1995, Buck murdered his ex-girlfriend Debra Gardner and her friend Kenneth Butler. Buck was arrested at the scene, and police found the murder weapons in the trunk of his car. Two witnesses identified him as the shooter. Buck laughed during and after the arrest and stated to one officer that "[t]he bitch got what she deserved."

Buck was convicted of capital murder for the deaths. During the penalty phase, the state presented evidence that Buck would likely remain dangerous. That evidence included his criminal history, his violent conduct, and his demeanor during and after the arrest.

Buck called Dr. Walter Quijano, a clinical psychologist, as an expert witness to testify regarding future dangerousness. Buck's lawyer asked Quijano what factors he would look at to determine whether an inmate would engage in future acts of violence. Quijano explained several, including age, sex, race, social economics, and substance abuse. For example, he testified that advanced age and increased wealth correlated with a decline in the likelihood of committing future violent acts. On race, he gave a one-sentence explanation: "It's a sad commentary that minorities, Hispanics and black people, are over represented in the Criminal Justice System." That matched a statement included in Quijano's expert report, which was introduced as evidence.

During cross-examination, the prosecution elicited one more comment on

race from Quijano: Question: "You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?" Answer: "Yes." During closing arguments, the prosecution referenced Quijano's testimony generally and specifically noted that he had said that, although Buck was in the low range for a probability of committing future violent acts, the probability did exist. The prosecution did not reference Buck's race or Quijano's use of race.

The jury unanimously found beyond a reasonable doubt that there was a probability Buck would commit criminal acts of violence that would be a continuing threat to society. It further found that there were not sufficient mitigating circumstances to justify a life sentence. The court sentenced Buck to death, and the Texas Court of Criminal Appeals ("TCCA") affirmed.

Buck filed his first state habeas application in 1997; it contained no IAC claim or any other challenge based on Quijano's testimony. In 2000, however, the Texas Attorney General ("AG") admitted to the Supreme Court in *Saldano v. Texas*, 530 U.S. 1212 (2000), that the state had erred in calling Quijano as a witness and having him testify that the defendant's race increased the likelihood of future dangerousness. Shortly after the Court vacated and remanded *Saldano* on that confession of error, the AG publicly identified eight other cases involving racial testimony by Quijano, six of which the AG said were similar to Saldano's case; one of those was Buck's. Buck contends that Texas "promised to concede constitutional error and waive its procedural defenses" in his case so that he could get resentenced without the race-related testimony.[1]

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[1] It has never been established that the AG's office promised not to raise procedural defenses in Buck's case. The record contains a news release by the AG's office stating that a post-*Saldano* audit had revealed "eight more cases in which testimony was offered by Dr. Quijano that race should be a factor for the jury to consider in making its determination

In 2002, while his first state habeas petition was pending, Buck filed a second petition that challenged Quijano's testimony on several grounds, including IAC. The TCCA ultimately denied the first habeas petition and dismissed the second as an abuse of the writ.

In 2004, Buck filed a federal habeas petition raising a litany of challenges to his sentence, including IAC. The court denied relief on that claim because Buck had not raised IAC on direct appeal or in his original state habeas petition. He had raised it in his second state habeas petition, but the TCCA dismissed it as an abuse of the writ, so it was procedurally defaulted. Buck sought a COA from this court on only one issue: "Was he deprived of due process or equal protection by the prosecution's reference to testimony from Buck's own penalty-phase expert witness . . . ?" *Buck*, 345 F. App'x at 924. We concluded that the claim was procedurally barred and meritless. *Id.* at 930.

After the state set an execution date of September 15, 2011, Buck moved for relief from the earlier district-court judgment under Federal Rule of Civil Procedure 60(b)(6), claiming that the state's failure to admit error and waive defenses was extraordinary and merited relief. The motion also asked for relief under Rule 60(d)(3), alleging that the AG had committed fraud on the court.

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about the sentence in a capital murder trial," of which six were similar to *Saldano*. The same release stated that the AG's office "sent letters to opposing counsel and to the local prosecutors involved advising them of [the AG's] investigation." But we have found no statement by the AG in the record in which he confessed error relating to Buck's case and promised not to raise procedural defenses.

The record contains a *Houston Chronicle* article from 2000 that paraphrases the AG's spokesperson as saying, "If the attorneys amend their appeals currently pending in federal court to include objections to Quijano's testimony, the attorney general will not object." The spokesperson is quoted as representing that cases still with the district attorney's offices "will be handled in a similar manner as the Saldano case." A *New York Times* article went further, stating, "[The AG's] staff has notified defense lawyers representing the six inmates that his office will not object if they seek to overturn the death sentences based on Mr. Quijano's testimony." Because it does not change the outcome of this appeal, we need not explore whether such a promise was made or how explicit it was.

The district court denied the motion and, three days later, Buck filed a motion to amend the judgment under Rule 59(e), claiming that the AG had made material misrepresentations and omissions in opposing the earlier motion for relief. The court denied that motion as well. We declined to permit a successive habeas petition or issue a COA *Buck*, 452 F. App'x at 433.

The Supreme Court stayed Buck's execution to consider his petition for writ of certiorari. It ultimately denied the petition, accompanied by a statement respecting that denial and a dissent. *Buck v. Thaler*, 132 S. Ct. 32, 32–35 (2011) (Alito, J., respecting the denial of certiorari); *id.* at 35–38 (Sotomayor, J., dissenting from the denial of certiorari).

In 2013, Buck filed another state habeas petition. The trial court concluded that it was a subsequent petition and referred it to the TCCA. While that petition was pending, the Supreme Court decided *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), holding that Texas's procedural regime rendered it almost impossible to raise IAC claims on direct appeal, making the scheme similar to the one in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). The Court therefore held that the *Martinez* exception applied in Texas: The lack of effective counsel during initial state collateral-review proceedings could excuse a procedural default on an IAC claim. *Trevino*, 133 S. Ct. at 1921.

The TCCA dismissed the petition as an abuse of the writ. *Ex parte Buck*, 418 S.W.3d 98 (Tex. Crim. App. 2013). Three judges dissented, concluding that Buck had made out a potentially meritorious case of IAC relating to his attorney's alleged failure adequately to investigate and present mitigating evidence. *Id.* at 98–114 (Alcala, J., dissenting).

In January 2014, Buck again filed for Rule 60(b)(6) relief from judgment in his federal habeas case. He focused solely on his IAC claim, contending that counsel was ineffective for introducing Quijano and that his case was

sufficiently extraordinary to justify relief under Rule 60(b)(6). The district court denied the motion, holding that Buck's case did not have the extraordinary circumstances required for Rule 60(b)(6). It also held that Buck had failed to make out an IAC claim, establishing deficient performance but not prejudice. Within a month of that denial, Buck again moved for relief under Rule 60(b)(6), essentially disagreeing with the district court's disposition of the issues. On March 11, 2015, the district court denied that motion as well and declined to issue a COA.

II.

To obtain a COA, Buck must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). On application for a COA, we engage in "an overview of the claims in the habeas petition and a general assessment of their merits" but do not engage in "a full consideration of the factual or legal bases adduced in support of the claims," asking only whether the district court's resolution of the claim "was debatable among jurists of reason." *Miller-El*, 537 U.S. at 322.

The district court denied the motion for a procedural reason, namely, Buck's failure to show extraordinary circumstances justifying relief under Rule 60(b)(6). We therefore must deny a COA if Buck fails to establish both (1) that jurists of reason would find debatable "whether the petition states a valid claim of the denial of a constitutional right" and (2) that those jurists "would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 429 U.S. 473, 484 (2000).

III.

Regarding the procedural bar, for a Rule 60(b)(6) motion in this posture not to be itself a successive habeas petition, the litigant "must not be challenging a prior merits-based ruling." *Balentine v. Thaler*, 626 F.3d 842,

846 (5th Cir. 2010). Instead, he must be challenging a previous ruling—such as procedural default or a statute-of-limitations bar—that precluded a merits determination. *Id.* at 846–47. The district court initially denied Buck's IAC claim because the TCCA's abuse-of-the-writ dismissal was an adequate and independent state ground for denying relief, so Buck's motion satisfies that requirement.

To obtain relief under Rule 60(b)(6), Buck must show "extraordinary circumstances," *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005), which "will rarely occur in the habeas context," *id.* at 535. There is little guidance as to what constitutes "extraordinary circumstances," but we have recognized that a change in a decisional law does not qualify, and we have cited with approval district-court decisions holding other circumstances not extraordinary as well, including IAC. *See Williams v. Thaler*, 602 F.3d 291, 312 (5th Cir. 2010).

Buck contends that eight equitable factors from *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396 (5th Cir. Unit A Jan. 1981), are the proper means for evaluating a Rule 60(b) motion in a habeas case.[2] We have declined to answer whether *Seven Elves* sets the standard for a Rule 60(b)(6) motion in habeas proceedings. *See Diaz v. Stephens*, 731 F.3d 370, 376–77 (5th Cir. 2013). We need not answer it now because Buck has not made out even a minimal showing that his case is exceptional.

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[2] Those factors are "(1) [t]hat final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether if the judgment was a default or a dismissal in which there was no consideration of the merits the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether if the judgment was rendered after a trial on the merits the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack." *Seven Elves*, 635 F.2d at 402.

The January 2014 motion contains eleven facts, reurged in the COA application, that Buck says make the case extraordinary:

1. Mr. Buck's trial attorney knowingly presented expert testimony to the sentencing jury that Mr. Buck's race made him more likely to be a future danger;

2. Although required to act as gate-keeper to prevent unreliable expert opinions from reaching and influencing a jury, see Tex. R. Evid. 705(c); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992), the trial court qualified Dr. Quijano as an expert on predictions of future dangerousness, allowed him to present race based opinion testimony to Mr. Buck's capital sentencing jury, and admitted Dr. Quijano's excludable hearsay report linking race to dangerousness;

3. The trial prosecutor intentionally elicited Dr. Quijano's testimony that Mr. Buck's race made him more likely to be a future danger on cross-examination, vouched for him as an "expert" in closing, and asked the jury to rely on Dr. Quijano's testimony to answer the future dangerousness special issue in the State's favor;

4. Mr. Buck's state habeas counsel did not challenge trial counsel's introduction of this false and offensive testimony — or Texas's reliance on it — in Mr. Buck's initial state habeas application;

5. The Texas Attorney General conceded constitutional error in Mr. Buck's case and promised to ensure that he received a new sentencing, but reneged on that promise after deciding that the introduction of the offensive testimony was trial counsel's fault;

6. This Court ruled that federal review of Mr. Buck's trial counsel ineffectiveness claim was foreclosed by state habeas counsel's failure to raise and litigate the issue in Mr. Buck's initial state habeas petition, relying on *Coleman*, which has subsequently been modified by *Martinez* and *Trevino*;

7. The Fifth Circuit held Mr. Buck's trial counsel responsible for the introduction of Dr. Quijano's testimony linking Mr. Buck's race to his likelihood of future dangerousness;

8. Three Supreme Court Justices concluded that trial counsel was at fault for the introduction of Dr. Quijano's testimony;

9. Three Judges of the CCA found that "because [Mr. Buck's] initial habeas counsel failed to include any claims related to Quijano's testimony in his original [state habeas] application, no court, state or

federal, has ever considered the merits of those claims," *Buck*, 2013 WL 6081001, at *5;

10. Mr. Buck's case is the only one in which Texas has broken its promise to waive procedural defenses and concede error, leaving Mr. Buck as the only individual in Texas facing execution without having been afforded a fair and unbiased sentencing hearing; and
11. Martinez and Trevino now allow for federal court review of "substantial" defaulted claims of trial counsel ineffectiveness.

Initial examination of those facts reveals that they are not extraordinary at all in the habeas context. Numbers 1–3, 7, and 8 are just variations on the merits of Buck's IAC claim, which is at least unremarkable as far as IAC claims go. Buck's IAC claim is not so different in kind or degree from other disagreements over trial strategy between lawyer and client that it counts as an exceptional case. Nor are IAC claims as a class extraordinary under Rule 60(b)(6). The Court warned in *Gonzalez*, 545 U.S. at 536, that extraordinary circumstances will rarely be present in the habeas context.

The fourth and ninth extraordinary facts merely point out that Buck's IAC claim was procedurally defaulted and did not get a merits determination. That is not an extraordinary circumstance in the habeas context; it is the nature of procedural defaults that many potentially viable claims will never advance to a merits determination. No jurists of reason would expand the definition of "extraordinary" to reach all procedurally defaulted IAC claims.

The sixth and eleventh facts relate to Buck's notion that *Trevino* and *Martinez* changed the law regarding procedural defaults in IAC claims in a way that could have excused his procedural default. *Martinez*, however, "was simply a change in decisional law" that is not an extraordinary circumstance under Rule 60(b)(6), and "*Trevino*'s recent application of *Martinez* to Texas cases does not change that conclusion in any way." *Diaz*, 731 F.3d at 376 (internal quotation marks omitted).

Those facts plainly fail to make even a plausible argument that Buck's is the extraordinary case that satisfies Rule 60(b)(6). He has repeatedly asserted, however, that his case is special because of the *Saldano*-related statements by the AG. Buck contends the AG conceded that Quijano's testimony was unconstitutional but reneged on a promise to resentence Buck (fact five), despite Texas's following through in other cases involving Quijano (fact ten).

Even if the AG initially indicated to Buck that he would be resentenced—a fact that has never been adequately established, *see* note 1, *supra*—his decision not to follow through is not extraordinary. The broken-promise element to this case makes it odd and factually unusual, but extraordinary circumstances are not merely found on the spectrum of common circumstances to unique circumstances. And they must be extraordinary circumstances "justifying relief from the judgment." *Gonzalez*, 545 U.S. at 537. Buck has not shown why the alleged reneging would justify relief from the judgment. For example, he has not shown that he relied on the alleged promise to his detriment.

Nor is it extraordinary that the AG confessed error and waived procedural bars in other cases and not in Buck's. We have previously rejected the notion that some concept of "intra-court comity" requires the state to waive procedural defenses in similar cases. *See Buck*, 345 F. App'x at 929. Even assuming *arguendo* that the other cases at issue are materially similar to Buck's (which the state disputes), it can hardly be extraordinary that the state chose different litigation strategies between the two cases. Jurists of reason would not debate that Buck has failed to show extraordinary circumstances justifying relief.

Buck has not demonstrated that jurists of reason would debate whether his case is exceptional under Rule 60(b)(6). The request for a COA is DENIED.

Certified as a true copy and issued as the mandate on Aug 20, 2015

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

Appendix C

App. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DUANE EDWARD BUCK,	§	
	§	
Petitioner,	§	
	§	
v.	§	H-04-3965
	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice-Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER

Duane Edward Buck is a Texas death row inmate. On July 24, 2006, this Court denied his petition for a writ of habeas corpus. Among the claims denied were Buck's claims that he received ineffective assistance of counsel when his counsel called as an expert witness Dr. Walter Quijano, who mentioned an issue relating to race during the penalty phase of Buck's trial. Buck further contended that counsel was ineffective for failing to object when the prosecutor asked Dr. Quijano a question raising a racial issue on cross-examination. This Court found that those claims were procedurally defaulted, and the Fifth Circuit denied Buck's request for a certificate of appealability. *See Buck v. Thaler*, 345 Fed. App'x 923 (5th Cir., 2009).

In 2012, the Supreme Court issued its decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), holding that ineffective assistance of state habeas counsel could, in certain

circumstances, constitute cause to excuse a procedural default of an ineffective assistance of trial counsel claim. In *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), the Supreme Court held that *Martinez* is applicable to the Texas capital postconviction process. On January 7, 2014, Buck, relying on *Martinez* and *Trevino*, filed a motion for relief from the judgment of this Court under Rule 60(b)(6) of the Federal Rules of Civil Procedure (Inst. # 49). This Court denied that motion on August 29, 2014.

On September 26, 2014, Buck filed a motion to alter or amend judgment (Inst. # 67). For the reasons stated below, the motion is denied.

A motion to alter or amend under Fed.R.Civ.P. 59(e) "must clearly establish either a manifest error of law or must present newly discovered evidence." *Schiller v. Physicians Resource Grp., Inc.*, 342 F.3d 563, 567 (5th Cir. 2003)(internal quotation marks omitted). "Relief under Rule 59(e) is also appropriate where there has been an intervening change in controlling law." *Id.*

Buck contends that, in denying relief on his Rule 60 motion, this Court "improperly excluded from its consideration significant evidence . . . ." Motion to Alter or Amend (Inst. # 67) at 2. This assertion misrepresents the Court's opinion, which carefully considered all of Buck's argument and the entire record in this case.

This Court based the denial on the Court's extensive knowledge and re-review of the record in this case and independent review of relevant case law. Based on the record and controlling law, the Court concluded that Buck was not entitled to relief. The specific

reasons for the denial of Buck's Rule 60 motion are explained in detail in the 18 page order denying that motion.

Contrary to the assertions in Buck's motion, this Court specifically addressed Buck's arguments that his case presents "extraordinary circumstances" justifying relief, both in the text of the order denying his most recent Rule 60(b) motion, *See* August 29, 2014, Memorandum and Order (Inst. # 66) at 8-10, and by reference to other orders and opinions addressing these arguments, *see id.* at 8. Buck cites no new law in support of his argument and, aside from his wholly inaccurate assertion that this Court excluded evidence from its consideration, merely expresses his disagreement with the Court's analysis and conclusion. That disagreement does not demonstrate a manifest error of law, present newly discovered evidence, or rely on an intervening change in controlling law. It therefore does not provide grounds for relief.

This Court also found that, while Buck's counsel rendered deficient performance, Buck did not demonstrate that he was prejudiced by that deficient performance. Because of this, Buck failed to demonstrate that he presented a substantial underlying claim of ineffective assistance of counsel, and therefore could not overcome his procedural default under *Martinez*. Buck now argues that this Court's prejudice analysis was wrong.

Once again, Buck's argument boils down to mere disagreement with this Court's analysis. While Buck cites a few cases in which a court found that a defendant was prejudiced by counsel's deficient performance in a capital sentencing proceeding despite

evidence of a heinous crime, he cannot dispute that this analysis must be highly fact-specific. As discussed in detail in this Court's prior order, while counsel was deficient for calling Dr. Walter Quijano as an expert witness, any harm caused by his objectionable testimony was *de minimis* in light of, among other things: 1) the extremely limited scope of that testimony; 2) the fact that the prosecution did not refer to the objectionable testimony in closing argument; 3) the facts of Buck's crime, including the fact that he murdered one of his victims in front of her young children as the victim begged for her life; and 4) Buck's lack of remorse. Once again, Buck's argument comes down to the fact that he disagrees with this Court's conclusion that counsel's deficient performance did not, in light of the entire record, raise a reasonable probability that the outcome of the sentencing hearing would have been different had counsel not called Dr. Quijano to testify. *See Strickland v. Washington*, 466 U.S. 668, 694-95 (1984). As discussed above, Buck's disagreement with this Court's analysis does not provide a basis for relief under Rule 59.

Moreover, because this Court's finding that Buck is not entitled to relief is not debatable among jurists of reason, Buck is not entitled to a certificate of appealability from this Order. *See Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). For the foregoing reasons,

IT IS ORDERED THAT Buck's Motion to Alter or Amend Judgment (Inst. # 67) is **Denied**; and

IT IS FURTHER ORDERED THAT no certificate of appealability shall issue.

SO ORDERED.

SIGNED at Houston, Texas, on this 11th day of March, 2015.

VANESSA GILMORE
United States District Judge

Appendix D

App. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DUANE EDWARD BUCK,	§	
	§	
Petitioner,	§	
	§	
v.	§	H-04-3965
	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice-Correctional Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM AND ORDER

Pending is petitioner's motion for relief from judgment (Inst. # 49). Petitioner seeks relief from the judgment of this Court entered on July 24, 2006 (Inst. # 16).

Duane Edward Buck is currently incarcerated on death row in Texas. On July 24, 2006, this Court denied his petition for a writ of habeas corpus. Among the claims denied were Buck's claims that he received ineffective assistance of counsel when his counsel called as an expert witness Dr. Walter Quijano, who mentioned an issue relating to race during the penalty phase of Buck's trial. Buck further contended that counsel was ineffective for failing to object when the prosecutor asked Dr. Quijano a question raising a racial issue on cross-examination. This Court found that those claims were procedurally defaulted, and the Fifth Circuit denied Buck's request for a certificate of appealability. *See Buck v. Thaler*, 345 Fed. App'x 923 (5th Cir., 2009).

App. 2

In 2012, the Supreme Court issued its decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), holding that ineffective assistance of state habeas counsel could, in certain circumstances, constitute cause to excuse a procedural default of an ineffective assistance of trial counsel claim. In *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), the Supreme Court held that *Martinez* is applicable to the Texas capital postconviction process. On January 7, 2014, Buck, relying on *Martinez* and *Trevino*, filed the current motion for relief from the judgment of this Court under Rule 60(b)(6) of the Federal Rules of Civil Procedure (Inst. # 49).

I. Background

The facts are not in dispute. During the early morning hours of July 30, 1995, Harold Ebenezer, his brother Kenneth Butler, Buck's sister Phyllis Taylor, and Debra Gardner all gathered at Gardner's house after a night out playing pool. Buck lived in the house with Gardner on and off over the previous few years, but Gardner and Buck broke up two or three weeks earlier.

Buck banged loudly on Gardner's door and Gardner called "911." Buck then forced the door open and entered the house. He argued with Gardner and struck her. Buck then stated that he was there to pick up his clothes. He retrieved a few things and left.

At about 7:00 a.m., Buck returned with a rifle and shotgun. Upon entering the house, he shot at Ebenezer but missed. Ebenezer fled the house. Buck then walked up to his sister, Taylor, put the muzzle of one of the guns against her chest, and shot her. Taylor survived.

App. 3

After she was shot, Taylor heard more shots coming from the vicinity of the bedrooms. As she made her way through the house, Taylor saw Butler's body in the hallway. After escaping, Ebenezer also heard two or three more shots fired inside the house. As he came around to the front of the house, Ebenezer saw Gardner walking toward the street with Buck following her.

Devon Green, Gardner's son, hid in the closet after hearing the first shot fired. Shortly thereafter, he heard Buck's voice accusing Butler of sleeping with "his wife,"followed by another gunshot. After a short while, Green looked out into the hall and saw Butler leaning against the wall bleeding. Green then ran outside and saw Buck shoot his mother and put two guns in the trunk of his car. Gardner's teenage daughter, Shennel Gardner, also saw Butler in the hallway after he was shot and then went outside and saw Buck shoot her mother. Both Butler and Gardner died from their wounds.

When police arrived, both Green and Ebenezer identified Buck as the shooter. Police subsequently retrieved a shotgun and a .22 caliber rifle from the trunk of Buck's car.

The case was tried to a jury. The jury found Buck guilty of capital murder at the conclusion of the guilt-innocence phase of the trial.

During the penalty phase, the State presented evidence of Buck's prior convictions for delivery of cocaine and unlawfully carrying a weapon. Vivian Jackson, Buck's ex-girlfriend and the mother of Buck's son, testified that Buck physically abused her and threatened her with a gun. One of the police officers who accompanied Buck after his arrest

testified that Buck was laughing. When the officer commented that he did not think the situation was very funny, Buck responded: "The bitch deserved what she got."

Buck presented evidence that he is a peaceful, nonviolent, person, that his mother died when he was 12 years old, that he worked as an auto mechanic, and that his father served several jail sentences for non-violent felonies. The defense also called Dr. Walter Quijano, a clinical psychologist, as an expert witness. Dr. Quijano opined, based on his evaluation of Buck, that Buck has a dependent personality disorder. People suffering from this disorder can become obsessive about relationships and have a very difficult time letting go after a relationship ends.

Dr. Quijano also testified that several factors can be predictive of future dangerousness. These include, according to Dr. Quijano, past violent behavior, the age and sex of the defendant (with older defendants less likely to be violent in the future, and male defendants more likely than female defendants to be violent), socio-economic status, and history of substance abuse. Dr. Quijano also testified that Latinos and African-Americans are over-represented in the penal system. Applying these factors to Buck, Quijano testified that Buck's lack of a violent past made it less likely that he would be violent in the future. Based on his selection of victims (a former girlfriend) and his prison disciplinary record, Quijano concluded that he is unlikely to be violent in prison.

Buck also called Dr. Patrick Gordon Lawrence, another clinical psychologist. Dr. Lawrence agreed that Buck has a dependent personality and that he poses a low probability

of future violence. The jury found that Buck posed a future danger to society, and that there was insufficient mitigating evidence to justify a sentence of life imprisonment. Accordingly, the trial court sentenced Buck to death.

The Texas Court of Criminal Appeals ("TCCA") affirmed Buck's conviction and sentence on April 28, 1999. *Buck v. State*, No. 72,810 (Tex. Crim. App. Apr. 28, 1999). On March 22, 1997, Buck filed a state habeas corpus petition. On December 13, 2002, he filed a successive state habeas application. On January 23, 2003, the trial court found that Buck's second petition was a subsequent habeas application and ordered the clerk to send it to the TCCA. The trial court recommended denying Buck's original petition on July 23, 2003. On October 15, 2003, the TCCA adopted the trial court's findings and recommendation and denied Buck's first application, and dismissed his second application as an abuse of the writ. *Ex Parte Buck* , Nos. 57,004-01, -02 (Tex. Crim. App. Oct. 15, 2003) (*per curiam*).

On October 14, 2004 , Buck filed his federal petition for a writ of habeas corpus. This Court denied his petition on July 24, 2006, the Fifth Circuit denied Buck's request for a certificate of appealability, *Buck v. Thaler*, No. 06-70035 (5th Cir. Sept. 25, 2009), and the Supreme Court denied his petition for a writ of *certiorari*, *Buck v. Thaler*, 130 S.Ct. 2096 (2010).

On September 7, 2011, Buck filed a motion for relief from this Court's judgment. This Court denied that motion on September 9, 2011 (Inst. # 31). On September 12, 2011, Buck filed a motion to alter or amend the judgment denying his motion for relief from the

judgment. This Court denied that motion on the same day (Inst. # 36). The Fifth Circuit denied Buck's request for a certificate of appealability on September 14, 2011. *Buck v. Thaler*, 452 Fed. App'x 423 (5th Cir. 2011). The Supreme Court denied Buck's petition for a writ of *certiorari* on November 7, 2011. *Buck v. Thaler*, 132 S.Ct. 32 (2011).

The Supreme Court decided *Martinez* in 2012, and *Trevino* in 2013. On January 7, 2014, Buck filed this Rule 60(b) motion.

II. Analysis

In this renewed motion for relief from the judgment, Buck argues that his trial counsel rendered ineffective assistance by calling Dr. Quijano to testify. Buck's counsel asked Dr. Quijano to discuss certain statistical factors relevant to determining whether a defendant poses a future threat to commit criminal acts of violence. Among the factors Dr. Quijano discussed on direct examination was race. Dr. Quijano testified that "minorities, Hispanics and black people are over represented in our Criminal Justice System." The prosecutor asked an additional race related question on cross-examination. Buck is African-American.

In his habeas petition, Buck argued that Dr. Quijano's reliance on race as a statistical predictor of future dangerousness, and the prosecutor's reference to this testimony on cross-examination, invited the jury to consider his race as a predictor of future dangerousness. He also argues that his counsel rendered ineffective assistance by eliciting this race related testimony from Dr. Quijano, and that counsel was ineffective for failing to object when the prosecutor asked a question about this testimony during Quijano's cross examination.

Buck notes that the Texas Attorney General conceded error in several other cases involving similar testimony by the same witness. He contends that the Attorney General also stated that he would not assert procedural defenses to such claims in federal court, but asserted such a defense in this case.

Buck conceded that he did not raise these claims either in his direct appeal or in his original state habeas corpus application, though he did raise them in his successive state habeas application. The TCCA dismissed the successive petition as an abuse of the writ. This Court therefore had no choice but to find the claims procedurally defaulted. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

This Court also discussed whether Buck could avoid the procedural default by showing that he is "actually innocent of the death penalty," *i.e.*, but for a constitutional error, he would not have been legally eligible for a sentence of death, *see Sawyer v. Whitley*, 505 U.S. 333, 335 (1992). The penalty phase evidence showed that Buck had a history of domestic violence, including threatening his ex-girlfriend with a gun, shot his own sister during the rampage that resulted in the murders of Gardner and Butler, murdered Gardner in front of her children, showed no remorse for the murders, and laughed when asked about the murders. The Court found that the evidence presented was sufficient for the jury to conclude that Buck posed a future danger and was therefore eligible for a sentence of death.

A. Rule 60(b)

Rule 60(b)(6) provides for relief from a judgment for "any . . . reason that justifies relief." This Court can consider the motion if it "attacks, not the substance of the federal court's resolution [of Buck's habeas corpus petition] on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). Relief under Rule 60(b) is available only if the case presents "extraordinary circumstances." *Id.* at 536.

Generally speaking, a "change in decisional law after entry of judgment does not constitute extraordinary circumstances" and is not alone a ground for relief from a final judgment under Rule 60(b)(6). *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (internal quotation marks and citation omitted). *Adams* specifically rejected the argument that *Martinez*, standing alone, constitutes "extraordinary circumstances" justifying relief under Rule 60(b)(6). *Id.* at 320. Buck argues that his case does present extraordinary circumstances because of the nature of Quijano's testimony, the fact that the claims have never been addressed on the merits by a reviewing court due to procedural bars, and the Texas Attorney General's decision not to raise procedural defenses in cases that Buck claims are similar.

As previously addressed in this Court's memorandum and order denying Buck's petition, Quijano's testimony on direct examination in this case noted the fact that African-Americans and Latinos are over-represented in the penal system. On cross examination,

Quijano answered "yes" when asked: "You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?" 28 Tr. at 160. Buck challenged this testimony solicited on cross examination, but the Fifth Circuit has previously rejected his claim that his case is similarly situated to the other cases in which Quijano testified.

> Citing a line of cases in which Texas has conceded error and waived procedural default after the *prosecution* had introduced Dr. Quijano as an expert witness during the penalty phase, Buck contends that notions of "intra-court comity" compel us to conclude that the State must also waive procedural default in the instant case. Buck's case, however, differs markedly from, e.g., *Saldano v. Roach*, [363 F.3d 545 (5th Cir. 2004),] in which the prosecution introduced Dr. Quijano as an expert witness and then proceeded to question him as to how the defendant's race might serve as a predictor of future dangerousness. In *Saldano*, the State conceded its error and waived any procedural bar that otherwise might have precluded our review of the defendant's claim on the merits. Here, in contrast, the State has not conceded any error or waived its procedural bar. Rather, the State has consistently maintained that it did not violate Buck's constitutional rights merely by questioning Buck's own witness – without objection from Buck – on the very same issues first discussed by that witness during direct examination by the defense, a classic example of the defense "opening the door" for the prosecutor to pursue the subject. Because Buck's characterization of "intra-court comity" finds no support in our precedent, we decline to apply here concessions made by the State in a different case with different facts. Such a broad expansion of a party's case-specific concession would not only contravene our precedent, but would also discourage the State from conceding error when it seeks to correct its own mistakes – both of which are clearly undesirable results.

Buck v. Thaler, 345 Fed. App'x 923, 929 (5th Cir. 2009) (footnotes omitted). The Fifth Circuit has found that Buck's case is different in critical respects from the cases in which Texas confessed error.

Finally, Buck's argument that this Court should grant relief because no court has yet reviewed the merits of his ineffective assistance of counsel claims is circular. Procedural bars prevent courts from reviewing claims on the merits. Buck's claim is procedurally defaulted. Therefore, the claim has not been reviewed on the merits. Buck suggests that the fact that the claims are defaulted should constitute extraordinary circumstances excusing the default. Other than citing *Martinez*, however, Buck has failed to demonstrate that this case presents extraordinary circumstances. While the introduction of any mention of race was ill-advised at best and repugnant at worst, it was, in this case, *de minimis*. As respondent points out, there were two references to race in Dr. Quijano's testimony. On direct examination, Quijano stated the indisputable fact that African-Americans and Latinos are over-represented in the criminal justice system. On cross examination, Dr. Quijano answered affirmatively when questioned about earlier findings he had made that being black is one statistical factor he considered in reaching his conclusion. The prosecutor did not make any race-based argument in closing. Moreover, the State's confession of error in other cases does not create any legally enforceable rights, nor does equity demand that the confession of error be extended to Buck's case for the reasons stated by the Fifth Circuit and quoted above. Finally, the fact that his claims have not been reviewed on the merits is a result of the fact that they

were procedurally defaulted. If that constituted "extraordinary circumstances," then the change in decisional law represented by *Martinez*, would, by itself, provide grounds for relief under Rule 60(b). As noted above, both the Supreme Court and the Fifth Circuit have held otherwise. *See Gonzalez*, 545 U.S. at 531-32; *Adams*, 679 F.3d at319.

B. Ineffective Assistance of Counsel

Assuming without finding that Buck has demonstrated that his case presented "extraordinary circumstances," he would not be entitled to relief on the merits of his claim. In *Martinez*, the Supreme Court carved out a narrow equitable exception to the rule that a federal habeas court cannot consider a procedurally defaulted claim of ineffective assistance of counsel.

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim . . . where appointed counsel in the initial-review collateral proceeding . . . was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 . . . (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

Martinez v. Ryan, 132 S.Ct. 1309, 1318-19 (2012).

To prevail on a claim for ineffective assistance of counsel, Petitioner

> must show that . . . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires

> showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to prevail on the first prong of the *Strickland* test, Petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Reasonableness is measured against prevailing professional norms, and must be viewed under the totality of the circumstances. *Id.* at 688. Review of counsel's performance is deferential. *Id.* at 689.

In the context of a capital sentencing proceeding, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 465 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

During the penalty phase, the State presented evidence of Buck's prior convictions for delivery of cocaine, possession of a controlled substance, and unlawfully carrying a weapon. 28 Tr. at 5-28, 239-43. The State also presented testimony from Buck's former girlfriend recounting acts of domestic violence, including one instance in which Buck threatened her with a gun. *Id.* at 31-40.

In addition to Buck's past history, the jury was aware of the horrific facts of Buck's murder of Gardner and Butler. These included Buck's attempt to murder his own sister, and his murder of Gardner in front of her two children. The jury also heard that Buck was

laughing about the murders when he was arrested, and that he said about Gardner that "the bitch deserved what she got." *Id.* at 50-51.

Buck called several witnesses who knew him and testified that he was not violent. *See* 28 tr. at 77, 84-85, 96. He also called two expert witnesses: Dr. Quijano and Dr. Patrick Lawrence. Quijano was the former chief psychologist for TDCJ, *id.* at 101-02, and Lawrence was a psychologist specializing in prediction of future criminal behavior, *id.* at 177, 182-85.

Buck's counsel offered testimony that Quijano was neutral, emphasizing his experience working for TDCJ, *id.* at 101-04, and eliciting the fact that Quijano had testified for both defendants and the State in the past. *Id.* at 104-05. Quijano offered his opinion that Buck was not a future danger. *Id.* at 115. He based his conclusion, in part, on "several statistical factors . . . including, but not limited to age, sex, race, social economics, history of violence, and history of substance abuse." *Buck v. Thaler*, 345 Fed. App'x at 925. Included in Quijano's testimony was his observation that African-Americans and Latinos are over-represented in the criminal justice system. 28 Tr. at 111.

Nevertheless, the Court finds that counsel's representation fell below an objective standard of reasonableness under the first prong of *Strickland*. *See Strickland*, 466 U.S. at 687-88. Buck's trial counsel called Dr. Quijano as a witness even though he knew that Dr. Quijano had previously testified on the direct correlation between race and future dangerousness. Additionally, Buck's counsel had received Dr. Quijano's expert report before trial clearly stating that Buck's race made him statistically more likely to be a future danger.

Buck v. Thaler, __ U.S. __ 132 S. Ct. 32, 33 (2011). Despite the longstanding "'unceasing efforts' to eradicate racial prejudice from our criminal justice system," *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987), Buck's counsel called Dr. Quijano as a witness and relied on his expert report, although counsel was fully aware of Dr. Quijano's inflammatory opinions about race. There was no strategic reason to do so because Buck's counsel offered a second expert at trial, Dr. Lawrence, who had no history of this kind of troubling race-based testimony. Testimony like that of Dr. Quijano lends credence to any potential latent racial prejudice held by the jury. *Cf. Guerra v. Collins*, 916 F. Supp. 620, 636 (S.D. Tex. 1995), *aff'd sub nom. Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1996) (holding that a defendant is "entitled to have his punishment assessed by the jury based on consideration of the mitigating and aggravating circumstances concerning his personal actions and intentions, not those of a group of people with whom he shared a characteristic."). Buck's counsel recklessly exposed his client to the risks of racial prejudice and introduced testimony that was contrary to his client's interests. His performance fell below an objective standard of reasonableness, and the Court therefore finds that trial counsel's performance was constitutionally deficient.

However, the Court finds that under the facts of this case, Buck cannot show that he was prejudiced by his counsel's constitutionally deficient action. In light of the aggravating evidence, particularly the facts of the crime and Buck's actions following the murders, it cannot be said that there is a reasonable probability that the outcome would have been different if Quijano had made no reference to race. Although counsel rendered deficient

performance by calling Quijano as a witness, Buck suffered no *Strickland* prejudice as a result. Therefore, the Court finds that Petitioner has not established a claim of ineffective assistance of trial counsel on this issue.

Buck also contends that his counsel was ineffective for failing to object when the State asked Quijano a question about the issue of Buck's race. As the Fifth Circuit noted, Buck opened the door to this question. *See Buck v. Thaler*, 345 Fed. App'x at 930. Because Buck opened the door, any objection to the prosecutor's question would have been futile. "This Court has made clear that counsel is not required to make futile motions or objections." *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990). Counsel was not ineffective for failing to make a futile objection.

Assuming without deciding, however, that the prosecutor's question amounted to constitutional error, Buck cannot prove prejudice. As previously discussed, the evidence showed that Buck had a prior criminal history and was violent toward his ex-girlfriend. He committed a brutal double murder, killing one of the victims in front of her two young children, and shot his own sister in the chest. Under these facts, there is no reasonable probability that the outcome of the sentencing phase would have been different if counsel objected to the prosecutor's question.

C. Certificate of Appealability

Although Buck has not requested a certificate of appealability ("COA"), the court may nevertheless determine whether he is entitled to this relief in light of the court's rulings. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny a COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued."). A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does."). "A plain reading of the AEDPA compels the conclusion that COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone." *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997). A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez v. Johnson*, 213

F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). The Supreme Court has stated that

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253© is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . . the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). "[T]he determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134 (2001).

This Court concludes that Buck has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and that jurists of reason would not find it debatable whether this court is correct in its procedural determinations. Therefore, Buck is not entitled to a COA.

D. Conclusion

For the foregoing reasons, Buck's renewed motion for relief from the judgment (Inst. # 49) is denied.

III. Order

For the foregoing reasons, IT IS ORDERED THAT Buck's Motion For Relief From Judgment (Docket Entry 49) is **Denied**; and

IT IS FURTHER ORDERED THAT no certificate of appealability shall issue.

SO ORDERED.

SIGNED at Houston, Texas, on this 29th day of August, 2014.

VANESSA GILMORE
United States District Judge

Appendix E

App. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DUANE EDWARD BUCK,	§	
	§	
Petitioner,	§	
	§	
v.	§	H-04-3965
	§	
DOUG DRETKE, Director, Texas Department of Criminal Justice-Correctional Institutions Division,	§	
	§	
Respondent.	§	
	§	

Memorandum and Order

This case is before the Court on Petitioner Duane Edward Buck's Petition for Writ of Habeas Corpus and Respondent Doug Dretke's Motion for Summary Judgment. Having carefully considered the Petition, the Summary Judgment Motion, the evidence, and the arguments and authorities submitted by counsel, the Court is of the opinion that Respondent's Motion for Summary Judgment should be GRANTED, and Buck's Petition for Writ of Habeas Corpus should be DENIED.

I. Background[1]

During the early morning hours of July 30, 1995, Harold Ebenezer, his brother Kenneth Butler, Buck's sister Phyllis Taylor, and Debra Gardner all gathered at Gardner's house after a night out playing pool. Buck lived in the house with Gardner on and off over the previous few years, but Gardner and Buck broke up two or three weeks earlier.

Buck banged loudly on Gardner's door and Gardner called "911." Buck then forced the door open and entered the house. He argued with Gardner and struck her. Buck then stated that he was there to pick up his clothes. He retrieved a few things and left.

At about 7:00 a.m., Buck returned with a rifle and shotgun. Upon entering the house, he shot at Ebenezer but missed; Ebenezer fled the house. Buck then walked up to his sister, Taylor, put the muzzle of one of the guns against her chest, and shot her. Taylor survived.

After she was shot, Taylor heard more shots coming from the vicinity of the bedrooms. As she made her way through the house, Taylor saw Butler's body in the hallway. After escaping, Ebenezer also heard two or three more shots fired inside the house. As he came around to the front of the house, Ebenezer saw Gardner walking toward the street with Buck following her.

Devon Green, Gardner's son, hid in the closet after hearing the first shot fired. Shortly thereafter, he heard Buck's voice accusing Butler of sleeping with "his wife,"

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[1] The facts are adapted from the opinion of the Texas Court of Criminal Appeals ("TCCA") on Buck's direct appeal. *See Buck v. State*, No. 72,810 at 2-3 (Tex. Crim. App. Apr. 28, 1999). Any significant divergence from the TCCA statement of facts is noted with a specific citation to the record.

followed by another gunshot. After a short while, Green looked out into the hall and saw Butler leaning against the wall bleeding. Green then ran outside and saw Buck shoot his mother and put two guns in the trunk of his car. Gardner's teenage daughter, Shennel Gardner, also saw Butler in the hallway after he was shot and then went outside and saw Buck shoot her mother. Both Butler and Gardner died from their wounds.

When police arrived, both Green and Ebenezer identified Buck as the shooter. Police subsequently retrieved a shotgun and a .22 caliber rifle from the trunk of Buck's car.

During the penalty phase, the State presented evidence of Buck's prior convictions for delivery of cocaine and unlawfully carrying a weapon. 28 Tr. at 5-28.[2] Vivian Jackson, Buck's ex-girlfriend and the mother of Buck's son, testified that Buck physically abused her and threatened her with a gun. *Id.* at 30-36. One of the police officers who accompanied Buck after his arrest testified that Buck was laughing. When the officer commented that he did not think the situation was very funny, Buck responded: "The bitch deserved what she got." *Id.* at 62-70.

Buck presented evidence that he is a peaceful, nonviolent, person, that his mother died when he was 12 years old, that he worked as an auto mechanic, and that his father served several jail sentences for non-violent felonies. *Id.* at 76-100. The defense also called Dr. Walter Quijano, a clinical psychologist, as an expert witness. Dr. Quijano opined, based on his evaluation of Buck, that Buck has a dependent personality disorder. People suffering

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[2] "Tr." refers to the transcript of Buck's trial.

from this disorder can become obsessive about relationships and have a very difficult time letting go after a relationship ends.

Dr. Quijano also testified that several factors can be predictive of future dangerousness. These include, according to Dr. Quijano, past violent behavior, the age and sex of the defendant (with older defendants less likely to be violent in the future, and male defendants more likely than female defendants to be violent), socio-economic status, and history of substance abuse. Dr. Quijano also testified that race is a statistical predictor of future dangerousness based on the fact that Latinos and African-Americans are over-represented in the penal system. Applying these factors to Buck, Quijano testified that Buck's lack of a violent past made it less likely that he would be violent in the future. Based on his selection of victims (a former girlfriend) and his prison disciplinary record, Quijano concluded that he is unlikely to be violent in prison. *Id.* at 101-20.

Buck also called Dr. Patrick Gordon Lawrence, another clinical psychologist. Dr. Lawrence agreed that Buck has a dependent personality and that he poses a low probability of future violence. *Id.* at 177-206. The jury found that Buck posed a future danger to society, and that there was insufficient mitigating evidence to justify a sentence of life imprisonment. Accordingly, the trial court sentenced Buck to death. 29 Tr. at 278.

The TCCA affirmed Buck's conviction and sentence on April 28, 1999. *Buck v. State*, No. 72,810 (Tex. Crim. App. Apr. 28, 1999). On March 22, 1997, Buck filed a state habeas corpus petition. On December 13, 2002, he filed a successive state habeas application. SH.

at 2.[3] On January 23, 2003, the trial court found that Buck's second petition was a subsequent habeas application and ordered the clerk to send it to the TCCA. *Id.* at 18-19. The trial court recommended denying Buck's original petition on July 23, 2003. SH. at 119-27. On October 15, 2003, the TCCA adopted the trial court's findings and recommendation and denied Buck's first application, and dismissed his second application as an abuse of the writ. *Ex Parte Buck* , Nos. 57,004-01, -02 (Tex. Crim. App. Oct. 15, 2003) (*per curiam*). On October 14, 2004 , Buck filed this timely federal petition for a writ of habeas corpus.

II. The Applicable Legal Standards

A. The Anti-Terrorism and Effective Death Penalty Act

This federal petition for habeas relief is governed by the applicable provisions of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which became effective April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 335-36 (1997). Under the AEDPA, federal habeas relief based upon claims that were adjudicated on the merits by the state courts cannot be granted unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Kitchens v. Johnson*,190 F.3d 698, 700 (5th Cir. 1999).

For questions of law or mixed questions of law and fact adjudicated on the merits in

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[3] "SH." refers to the transcript of Buck's state habeas corpus proceeding.

state court, this Court may grant federal habeas relief under 28 U.S.C. § 2254(d)(1) only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]." *See Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.), *cert. denied*, 534 U.S. 885 (2001). Under the "contrary to" clause, this Court may afford habeas relief only if "'the state court arrives at a conclusion opposite to that reached by . . . [the Supreme Court] on a question of law or if the state court decides a case differently than . . . [the Supreme Court] has on a set of materially indistinguishable facts.'" *Dowthitt v. Johnson*, 230 F.3d 733, 740-41 (5th Cir. 2000), *cert. denied*, 532 U.S. 915 (2001) (quoting *Terry Williams v. Taylor*, 529 U.S. 362, 406 (2000)).[4]

The "unreasonable application" standard permits federal habeas relief only if a state court decision "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Terry Williams*, 529 U.S. at 406. "In applying this standard, we must decide (1) what was the decision of the state courts with regard to the questions before us and (2) whether there is any established federal law, as explicated by the Supreme

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[4] On April 18, 2000, the Supreme Court issued two separate opinions, both originating in Virginia, involving the AEDPA, and in which the petitioners had the same surname. *Terry Williams v. Taylor*, 529 U.S. 362 (2000), involves § 2254(d)(1), and *Michael Williams v. Taylor*, 529 U.S. 420 (2000), involves § 2254(e)(2). To avoid confusion, this Court will include the full name of the petitioner when citing to these two cases.

Court, with which the state court decision conflicts." *Hoover v. Johnson*, 193 F.3d 366, 368 (5th Cir. 1999). A federal court's "focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett*, 239 F.3d 683, 696 (5th Cir. 2001), *aff'd*, 286 F.3d 230 (5th Cir. 2002) (en banc), *cert. denied sub nom. Neal v. Epps*, 537 U.S. 1104 (2003). The solitary inquiry for a federal court under the 'unreasonable application' prong becomes "whether the state court's determination is 'at least minimally consistent with the facts and circumstances of the case.'" *Id.* (quoting *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997)); *see also Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir. 2001) ("Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.'").

The AEDPA precludes federal habeas relief on factual issues unless the state court's adjudication of the merits was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254 (d)(2); *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000), *cert. denied*, 532 U.S. 1039 (2001). The State court's factual determinations are presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Jackson v. Anderson*, 112 F.3d 823, 824-25 (5th Cir. 1997), *cert. denied*, 522 U.S. 1119 (1998).

B. The Standard for Summary Judgment in Habeas Corpus Cases

"As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000). Insofar as they are consistent with established habeas practice and procedure, the Federal Rules of Civil Procedure apply to habeas cases. *See* Rule 11 of the Rules Governing Section 2254 Cases. In ordinary civil cases, a district court considering a motion for summary judgment is required to construe the facts in the case in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"). Where a state prisoner's factual allegations have been adversely resolved by express or implicit findings of the state courts, however, and the prisoner fails to demonstrate by clear and convincing evidence that the presumption of correctness established by 28 U.S.C. § 2254(e)(1) should not apply, it is inappropriate for the facts of a case to be resolved in the petitioner's favor. *See Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Foster v. Johnson*, 293 F.3d 766, 777 (5th Cir.), *cert. denied sub nom Foster v. Epps*, 537 U.S. 1054 (2002); *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000), *cert. denied*, 532 U.S. 915 (2001); *Emery v. Johnson*, 940 F.Supp. 1046, 1051 (S.D. Tex. 1996), *aff'd*, 139 F.3d 191 (5th Cir. 1997), *cert. denied*, 525 U.S. 969 (1998). Consequently, where facts have been determined by the Texas state courts, this Court is bound by such findings unless an exception to 28 U.S.C. § 2254 is shown.

III. Analysis

Buck's petition raises eight claims for relief. These are addressed in turn.

A. Informing The Jury About Parole Eligibility

In his first claim for relief, Buck argues that the trial court violated his Fourteenth Amendment right to due process of law by refusing to inform, or allow Buck to inform, the jury of the law concerning Buck's parole eligibility if sentenced to life imprisonment. Buck contends that this unfairly impeded his ability to rebut the State's argument that he posed a future danger to society. In his second claim, Buck argues that this lack of information renders his sentence violative of the Eighth Amendment because it impeded his ability to offer mitigating evidence. In his third claim, Buck argues that the trial court's refusal to permit testimony concerning parole eligibility violated Buck's rights under the compulsory process clause of the Sixth Amendment.

The crux these three claims is whether the fact that a life sentence would make Buck ineligible for parole until he served 40 years in prison was relevant to the issue of his future dangerousness. He argues that his expert witnesses were not permitted to testify that this was a factor in their conclusions that he was not a future danger, and that his lawyers were also not permitted to inform the jury of this part of his experts' analysis.

Petitioner argues that his position is supported by the United States Supreme Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994). At the time of Simmons' conviction, South Carolina allowed for a sentence of life in prison without the possibility of parole upon conviction of a capital offense. In *Simmons*, the defense sought an instruction

informing the jury that life imprisonment would carry no possibility of parole, but the trial court refused. The Supreme Court held that when "the alternative sentence to death is life without parole . . . due process plainly requires that [the defendant] be allowed to bring [parole ineligibility] to the jury's attention by way of arguments by defense counsel or an instruction from the court." *Simmons*, 512 U.S. at 169 (citing *Gardner v. Florida*, 430 U.S. 349, 362 (1977)).

The *Simmons* court reasoned that when a state imposes the death penalty on the premise that the convicted individual poses a danger to society, the fact that the defendant may receive life without possibility of parole "will necessarily undercut the State's argument regarding the threat the defendant poses to society." *Simmons*, 512 U.S. at 169. To hold otherwise would create a "false dilemma by advancing generalized argument regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." *Id.* at 171.

Simmons addresses very specific circumstances: (1) When the state seeks the death penalty at least in part on the grounds that the defendant will be a future danger to society; and (2) when the alternative to a sentence of death is a sentence of life imprisonment without the possibility of parole.

> [I]f the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. Because truthful information of parole ineligibility allows the defendant to deny or explain the showing of future dangerousness, due

> process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court.

Simmons, 512 U.S. at 168-69 (internal quotation marks and citation omitted); *see also*, *Wheat v. Johnson*, 238 F.3d 357, 361-62 (5th Cir.), *cert. denied*, 532 U.S. 1070 (2001). While the State did seek a death sentence in this case partially on the basis that Petitioner would pose a continuing threat, the jury's alternative was a parole-eligible life sentence, not, as in *Simmons*, life without parole. *Id.* at 168 n.8.

The Fifth Circuit has repeatedly rejected Buck's claim.

> [T]he Supreme Court took great pains in its opinion in *Simmons* to distinguish states such as Texas, which does not provide capital sentencing juries with an option of life without parole, from the scheme in South Carolina which required an instruction on parole ineligibility . . . [T]he Fifth Circuit has repeatedly refused to extend the rule in *Simmons* beyond those situations in which a capital murder defendant is statutorily ineligible for parole.

Green v. Johnson, 160 F.3d 1029, 1045 (5th Cir. 1998), *cert. denied*, 525 U.S. 1174 (1999); *see also*, *Wheat*, 238 F.3d at 361-62 (5th Cir.), *cert. denied*, 532 U.S. 1070 (2001)(finding *Simmons* inapplicable to the Texas sentencing scheme); *Soria v. Johnson*, 207 F.3d 232 (5th Cir.), *cert. denied*, 530 U.S. 1286 (2000)(finding that "reliance on *Simmons* to demonstrate that the Texas capital sentencing scheme denied [petitioner] a fair trial is unavailing"); *Miller v. Johnson*, 200 F.3d 274, 290 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000) ("because Miller would have been eligible for parole under Texas law if sentenced to life, we find his reliance on *Simmons* unavailing")(internal quotation marks and citation omitted); *Hughes v. Johnson*,

191 F.3d 607, 617 (5th Cir. 1999), *cert. denied*, 528 U.S. 1145 (2000); *Muniz v. Johnson*, 132 F.3d 214, 224 (5th Cir.), *cert. denied*, 523 U.S. 1113 (1998)(stating that a claim based on *Simmons* "has no merit under the law in our circuit"); *Montoya v. Scott*, 65 F.3d 405, 416 (5th Cir. 1995), *cert. denied sub nom. Montoya v. Johnson*, 517 U.S. 1133 (1996) (holding that *Simmons* claims are foreclosed by recent circuit authority rejecting an extension of *Simmons* beyond situations in which a defendant is statutorily ineligible for parole"); *Allridge v. Scott*, 41 F.3d 213, 222(5th Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995)(stating that "*Simmons* is inapplicable to this case"); *Kinnamon v. Scott*, 40 F.3d 731, 733 (5th Cir.), *cert. denied*, 513 U.S. 1054 (1994) (refusing to "extend *Simmons* beyond cases in which the sentencing alternative to death is life without parole").

If these decisions left any doubt that *Simmons* provides no basis for the relief Petitioner seeks, the Supreme Court removed all such doubt in *Ramdass v. Angelone*, 530 U.S. 156 (2000). "*Simmons* applies only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." *Id.* at 169.

In this case, life without parole was not a possibility. Petitioner faced one of two sentences: Death, or life imprisonment with the possibility of parole at a future date. Therefore, as *Ramdass* and Fifth Circuit precedent make unmistakably clear, Petitioner's claims do not fall within the scope of *Simmons*.

Insofar as Petitioner seeks an extension of *Simmons* to the Texas scheme, this Court is barred from granting habeas relief on that basis by the non-retroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989). *See Wheat*, 238 F.3d at 361 (finding any extension

of Simmons to violate *Teague*); *Clark v. Johnson*, 227 F.3d 273, 282 (5th Cir. 2000), *cert. denied*, 531 U.S. 1167 (2001)(same); *Boyd v. Johnson*, 167 F.3d 907, 912 (5th Cir.), *cert. denied*, 527 U.S. 1055 (1999) ("Relief based on *Simmons* is foreclosed by *Teague*."). In *Teague*, the Supreme Court held that a federal court may not create new constitutional rules of criminal procedure on habeas review. *Id.* at 301. Thus, even if controlling precedent did not expressly hold that the *Simmons* rule does not cover Petitioner's case, relief would be barred by *Teague*.

Buck also argues, citing *Skipper v. South Carolina*, 476 U.S. 1 (1986), that information about parole eligibility is relevant mitigating evidence because it "might serve as a basis for a sentence less than death." *Id.* at 4. He therefore contends that the trial court's refusal to allow Buck to inform the jury about parole eligibility violates his Eighth Amendment right to present mitigating evidence. The Fifth Circuit, however, has consistently found that the Eighth Amendment does not require that a jury be informed of parole eligibility. *See Tigner v. Cockrell*, 264 F.3d 521, 525 (5th Cir. 2001). Therefore, Petitioner's motion for relief on his first through third claims is DENIED.

B. Ineffective Assistance Of Counsel

Buck argues that the evidence supported a finding that he acted under the immediate influence of sudden passion arising from an adequate cause when he committed the murders. In his fourth claim for relief, Buck argues that his trial counsel rendered ineffective assistance by failing to request a lesser included offense instruction based on this theory.

To prevail on a claim for ineffective assistance of counsel, Petitioner

> must show that . . . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to prevail on the first prong of the *Strickland* test, Petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Reasonableness is measured against prevailing professional norms, and must be viewed under the totality of the circumstances. *Id.* at 688. Review of counsel's performance is deferential. *Id.* at 689.

Buck committed the murders on July 30, 1995. The Texas statute defining a homicide committed under the influence of sudden passion as the lesser included offense of voluntary manslaughter was repealed on September 1, 1994. *See* Acts 1993, 73rd Leg., ch. 900, § 1.01. Where the prior version of the statute defined manslaughter as a homicide committed under the influence of sudden passion, the amended version, which was in effect at the time of Buck's crime, defines manslaughter as "recklessly caus[ing] the death of the individual." Tex. Penal § 19.04. Therefore, Texas law did not provide for the lesser included offense on which Buck now claims he was entitled to a jury instruction. Indeed, petitioner admits that this statutory definition of voluntary manslaughter existed only "[p]rior to September of 1994 . . . ." Pet. at 47.

Counsel's failure to request a jury instruction unsupported by the law did not constitute deficient performance. "Counsel cannot be deficient for failing to press a frivolous

point." *Sones v. Hargett*, 61 F.3d 410, 415 n.5 (5th Cir. 1995); *see also Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) ("This Court has made clear that counsel is not required to make futile motions or objections."). Therefore, petitioner fails to meet the first prong of the *Strickland* test and his petition for relief on this claim is DENIED.

C. Evidence Of Future Dangerousness Based On Race

Petitioner's fifth and sixth claims for relief relate to testimony offered during the penalty phase by Dr. Walter Quijano, who testified as an expert witness. Buck's counsel asked Dr. Quijano to discuss certain statistical factors relevant to determining whether a defendant poses a future threat to commit criminal acts of violence. Among the factors Dr. Quijano discussed was race. Dr. Quijano testified that "minorities, Hispanics and black people are over represented in our Criminal Justice System." 28 Tr. at 111. The prosecutor revisited this topic on cross-examination. Buck is African-American.

In his Fifth claim for relief, Buck argues that Dr. Quijano's reliance on race as a statistical predictor of future dangerousness, and the prosecutor's references to this testimony on cross-examination and in closing argument, violated Buck's Sixth and Fourteenth Amendment rights to an impartial jury, due process, and equal protection of the law. In his Sixth claim for relief, Buck contends his counsel rendered ineffective assistance by eliciting this testimony from Dr. Quijano.

Buck concedes that he did not raise these claims either in his direct appeal or on his original state habeas corpus application, though he did raise them in his successive state habeas application. As noted above, the TCCA dismissed the successive petition as an abuse

of the writ.

"When a state court declines to hear a prisoner's federal claims because the prisoner failed to fulfill a state procedural requirement, federal habeas is generally barred if the state procedural rule is independent and adequate to support the judgment." *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001). The Supreme Court has noted that

> [i]n all cases in which a state prisoner had defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). "This doctrine ensures that federal courts give proper respect to state procedural rules." *Glover v. Cain*, 128 F.3d 900, 902 (5th Cir. 1997) (citing *Coleman*, 501 U.S. at 750-51), *cert. denied*, 523 U.S. 1125 (1998); *see also Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (finding the cause and prejudice standard to be "grounded in concerns of comity and federalism").

To be "adequate" to support the judgment, the state law ground must be both "firmly established and regularly followed." *Ford v. Georgia*, 498 U.S. 411, 424 (1991). The Texas Court of Criminal Appeals applies its abuse of the writ doctrine regularly and strictly. *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir.) (per curiam), *cert. denied*, 515 U.S. 1153 (1995). Therefore, this claim is procedurally defaulted and this Court may not review the claim unless Buck demonstrates cause and prejudice, or that this Court's refusal to review the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.

"Cause" for a procedural default requires a showing that some objective factor external to the defense impeded counsel's efforts to comply with the state procedural rule, or a showing of a prior determination of ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Amadeo v. Zant*, 486 U.S. 214, 222 (1988). Buck does not argue that cause exists for his default.

A "miscarriage of justice" means actual innocence, either of the crime for which he was convicted or of the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 335 (1992). "Actual innocence of the death penalty" means that, but for a constitutional error, Buck would not have been legally eligible for a sentence of death. *Id.*

To show actual innocence,

> [T]he prisoner must 'show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial, the trier of the facts would have entertained a reasonable doubt of his guilt.

Kuhlmann v. Wilson, 477 U.S. 436, 455 n.17 (1986).

The penalty phase evidence showed that Buck had a history of domestic violence, including threatening his ex-girlfriend with a gun, shot his own sister during the rampage that resulted in the murders of Gardner and Butler, showed no remorse for the murders, and laughed when asked about the murders. This evidence was sufficient for the jury to conclude that Buck posed a future danger. Therefore, petitioner has not established that, but-for the allegedly improper testimony, he could not, as a matter of law, be sentenced to death.

Because Buck fails to establish either cause for his procedural default nor actual innocence of the death penalty, this Court may not review his Fifth and Sixth claims for relief.

D. Burden Of Proof On Future Dangerousness

In his Seventh claim for relief, Buck argues that the future dangerousness special issue violates the rules of *Ring v. Arizona*, 536 U.S. 584 (2002) and *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004). Specifically, Buck argues that the language of the statutory special issue, requiring the jury to determine whether there is a "probability" of future dangerousness, has the practical effect of reducing the burden of proof from "beyond a reasonable doubt" to a mere preponderance of the evidence, notwithstanding a specific statutory requirement of proof beyond a reasonable doubt.

Buck never presented these claims in state court. The AEDPA requires that a prisoner exhaust his available State remedies before raising a claim in a federal habeas petition.

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). As the Fifth Circuit explained in a pre -AEDPA case, "federal courts must respect the autonomy of state courts by requiring that petitioners advance in state court all grounds for relief, as well as factual allegations supporting those grounds. "[A]bsent special circumstances, a federal habeas petitioner must exhaust his state remedies by pressing his claims in state court before he may seek federal habeas relief." *Orman v.*

Cain, 228 F.3d 616, 619-20 (5th Cir. 2000); *see* 28 U.S.C. § 2254(b)(1) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State. . . .").

Ordinarily, a federal habeas petition that contains unexhausted claims is dismissed without prejudice, allowing the petitioner to return to the state forum to present his unexhausted claims. *Rose v. Lundy*, 455 U.S. 509 (1982). Such a result in this case, however, would be futile because Petitioner's unexhausted claims would be procedurally barred as an abuse of the writ under Texas law. A procedural bar for federal habeas review occurs if the court to which a petitioner must present his claims to satisfy the exhaustion requirement would now find the unexhausted claims procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

Texas prohibits successive writs challenging the same conviction except in narrow circumstances. Tex.CodeCrim.Proc.Ann. art. 11.071 § 5(a) (Vernon Supp. 2002). The Texas Court of Criminal Appeals will not consider the merits or grant relief on a subsequent habeas application unless the application contains sufficient specific facts establishing the following:

> (1) the current claims have not been and could not have been presented previously in an original application or in a previously considered application because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or
>
> (2) by a preponderance of the evidence, but for a violation of the

> United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.

Id.

Petitioner does not claim that he could not have presented the claim in one of his previous state habeas petitions because the factual basis for the claim did not exist, or that he is actually innocent. *Ring* was decided on June 22, 2002, and Buck did not file his successive state habeas petition until December 13, 2002. Therefore, Petitioner could have raised this claim in his prior successive state petition, and the unexhausted claim does not fit within the exceptions to the successive writ statute and would be procedurally defaulted in the Texas courts. *Coleman*, 501 U.S. at 735 n.1.[5] That bar precludes this Court from reviewing Petitioner's claim absent a showing of cause for the default and actual prejudice attributable to the default, or that this Court's refusal to review the claim will result in a fundamental miscarriage of justice. *Id.* at 750. Buck offers no argument that cause exists to excuse his default, or that he is actually innocent. Therefore, this Court cannot review his seventh claim.

E. Burden Of Proof On Lack Of Mitigation

The Texas capital sentencing statute requires the jury, after deciding that the defendant poses a future danger, to determine whether the defendant's mitigating evidence

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[5] Buck also cites *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004). While *Blakely* was not decided until after the TCCA dismissed both of Buck's state petitions, Buck does not argue that *Blakely* recognized any new substantive right concerning the burden of proof on aggravating factors. Rather, Buck merely argues that "*Blakely* confirms the foregoing *Ring* analysis." Pet. at 64.

is sufficient to justify imposing a sentence of life imprisonment rather than death. Tex. Code Crim. Pro. art. 37.071(2)(e)(1). In his Eighth and final claim for relief, Buck argues that the Texas capital sentencing statute violates the rules of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely* because it does not place the burden on the prosecution to prove that the mitigating evidence is insufficient to justify a life sentence.

Apprendi itself rejects Buck's position.

> Finally, the principal dissent ignores the distinction the Court has often recognized, *see, e.g., Martin v. Ohio*, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987), between facts in aggravation of punishment and facts in mitigation. . . . If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.

Apprendi, 530 U.S. at 491 n.16. The Supreme Court has thus drawn a critical distinction between aggravating and mitigating circumstances in sentencing proceedings. To the extent that some aggravating circumstance is required before the court may exceed an otherwise-prescribed sentencing range, the state must prove those aggravating circumstances beyond a reasonable doubt. Under the Texas capital sentencing statute, the statutory maximum sentence in the absence of proof of aggravating circumstances is life imprisonment. A court

cannot sentence a defendant to death unless the State proves beyond a reasonable doubt that there is a probability that the defendant will commit future acts of violence constituting a continuing threat to society. Tex.Crim.Pro. art. 37.071(2)(b)(1). Once the State has proven this factor, the defendant may be sentenced to death.

The sentencing scheme, however, gives a defendant another opportunity to show that death should not be imposed, even though the State has met its burden of proof. The mitigation special issue is, in this sense, analogous to an affirmative defense. *Apprendi* does not prohibit placing the burden of proof on this special issue on the defendant. The mitigation special issue does not address a factor necessary to increase the maximum sentence; rather, it addresses factors that allow the jury to impose a sentence *less than* the statutory maximum. Therefore, the mitigation special issue does not fall within the scope of *Apprendi*, and Buck is not entitled to relief on this claim.

IV. Evidentiary Hearing

Buck requests an evidentiary hearing. An evidentiary hearing is not required if there are "no relevant factual disputes that would require development in order to assess the claims." *Michael Williams v. Taylor*, 529 U.S. 420, 436 (2000) (stating that it was "Congress' to avoid unneeded hearings in federal habeas corpus"); *Robison v. Johnson*, 151 F.3d 256, 268 (5th Cir. 1998), *cert. denied*, 526 U.S. 1100 (1999). "If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require." Rule 8 of the Rules Governing Section 2254 Cases.

Each of Petitioner's claims can be resolved by reference to the state court record, the

submissions of the parties, and relevant legal authority. There is, therefore, no basis upon which to hold an evidentiary hearing on these claims.

V. Certificate of Appealability

Buck has not requested a certificate of appealability ("COA"), but this Court may determine whether he is entitled to this relief in light of the foregoing rulings. *See Alexander v. Johnson*, 211 F.3d 895, 898(5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny a COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued.") A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does."). "A plain reading of the AEDPA compels the conclusion that COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone." *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997).

A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve

encouragement to proceed further." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). The Supreme Court has stated that

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . . the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). "The nature of the penalty in a capital case is a 'proper consideration in determining whether to issue a [COA], but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate.'" *Washington v. Johnson*, 90 F.3d 945, 949 (5th Cir. 1996), *cert. denied*, 520 U.S. 1122 (1997) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). However, "the determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134 (2001).

This Court has carefully and exhaustively considered each of Buck's claims. While the issues Buck raises are clearly important and deserving of the closest scrutiny, the Court finds that each of the claims is foreclosed by clear, binding precedent. This Court concludes

that under such precedents, Buck has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court concludes that Buck is not entitled to a certificate of appealability on his claims.

VI. Order

For the foregoing reasons, it is ORDERED as follows:

1. Respondent Doug Dretke's Motion for Summary Judgment (Docket Entry 7) is GRANTED;

2. Petitioner Duane Edward Buck's Petition For Writ Of Habeas Corpus (Docket Entry 1) is DENIED; and

3. No Certificate of Appealability shall issue in this case.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas, on this 24th day of July, 2006.

Vanessa Gilmore
United States District Judge

Appendix F

CERTIFICATE OF APPEALABILITY REVIEW

Undersigned counsel, with research assistance from two students at Columbia Law School, Rachel M. Wagner and Andrew J. Simpson, reviewed electronically available opinions and orders from the United States Courts of Appeals for the Fourth, Fifth and Eleventh Circuits, published and unpublished, on or after January 1, 2011, in which a petitioner sought relief from his or her death sentence under 28 U.S.C. § 2254 and a motion for a Certificate of Appealability ("COA") was decided within the circuit.

Undersigned counsel used the Westlaw database, an online legal research service, to input search terms and retrieve the relevant cases. The first set of search terms were as follows: (1) (capital /s habeas) & 2254 & "certificate #of appealability"; (2) capital /25 2254 & "certificate #of appealability"; (3) (death /2 penalty) & 2254 & "certificate #of appealability"; (4) (capital /s habeas) & 2254 /50 "COA"; (5) (capital /25 2254) /50 "COA"; and (6) (death /2 penalty) & 2254 /50 "COA". These searches were narrowed to the Fourth, Fifth and Eleventh Circuits and by the relevant time period.

To ensure an exhaustive search, undersigned counsel also ran a search within a collection of cases tagged by Westlaw as concerning Certificates of Appealability (Westlaw assigns these cases with an internal number - 197k818). Within this section, a broad search for the terms "capital & 2254" and "death & 2254" was run in the Fourth, Fifth and Eleventh Circuit Courts, during the relevant time period. This uncovered a small number of additional cases.

After the cases were retrieved, undersigned counsel reviewed the cases to ensure they fit the criteria identified above (i.e., a capital case under 28 U.S.C. § 2254 in which the petitioner was under a death sentence and a motion for a COA was decided). Cases that were false hits were removed from consideration.

In the below chart, any case in which either the district court or the Court of Appeals granted a COA on any claim is listed as "Granted." If no court granted a COA on any claim, the case is listed as "Denied." If the Court of Appeals either granted a COA when the district court had denied a COA on all claims, or if the Court of Appeals expanded a COA granted by the district court, the case is described as "Granted, Circuit." If the district court is the only court that granted a COA, the case is described as "Granted, District." When a petitioner sought a COA on more than one occasion during the course of his federal appeals and two separate opinions were issued by the Court of Appeals during the relevant time period, those cases are listed separately.

Our review was limited to the electronically available opinions issued by the Court of Appeals during the last five years; the district court rulings were determined based on the procedural history in the Court of Appeals' opinion. With respect to the time frame, the only consideration was whether the Court of Appeals issued its decision within the last five years, regardless of whether or not the district court had also issued its decision within the last five years.

Based on the this review, a COA was denied on all claims in 58.9% (76 out of 129) of the cases arising out of the Fifth Circuit, while a COA was only denied in 6.3% (7 out of 111) and 0% of the cases arising out of the Eleventh and Fourth Circuits respectively.

Fourth Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Atkins, Randy	4th	Atkins v. Lassiter, 502 F.App'x. 244, 245 (4th Cir. 2012)	Granted, Circuit
Barnes, William	4th	Barnes v. Joyner, 751 F.3d 229, 232 (4th Cir. 2014)	Granted, District
Elmore, Edward	4th	Elmore v. Ozmint, 661 F.3d 783, 788 (4th Cir. 2011), as amended (Dec. 12, 2012)	Granted, District
Fowler, Elrico	4th	Fowler v. Joyner, 753 F.3d 446, 453 (4th Cir. 2014)	Granted, Circuit
Gray, Ricky	4th	Gray v. Zook, 806 F.3d 783, 790 (4th Cir. 2015)	Granted, District
Gray, Ricky	4th	Gray v. Pearson, 526 F.App'x 331, 332 (4th Cir. 2013)	Granted, District
Hurst, Jason	4th	Hurst v. Joyner, 757 F.3d 389, 394 (4th Cir. 2014)	Granted, District
Johnson, Shermaine	4th	Johnson v. Ponton, 780 F.3d 219, 222 (4th Cir. 2015)	Granted, District
Porter, Thomas	4th	Porter v. Zook, 803 F.3d 694, 696 (4th Cir. 2015)	Granted, District
Prieto, Alfredo	4th	Prieto v. Zook, 791 F.3d 465, 467 (4th Cir. 2015	Granted, Circuit
Richardson, Timothy	4th	Richardson v. Branker, 668 F.3d 128, 137 (4th Cir. 2012)	Granted, District
Teleguz, Ivan	4th	Teleguz v. Pearson, 689 F.3d 322, 325 (4th Cir. 2012)	Granted, Circuit
		Total Granted:	**12 (100%)**
		Total Denied:	**0 (0%)**

Fifth Circuit[1]

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Adams, Beunka	5th	Adams v. Thaler 421 F.App'x 322, 324 (5th Cir. 2011)	Granted, District
Allen, Guy Len	5th	Allen v. Stephens, 619 F.App'x 280, 281 (5th Cir. 2015)	Denied
Allen, Kerry Dimart	5th	Allen v. Stephens, 805 F.3d 617, 622 (5th Cir. 2015)	Denied
Ayestas, Carlos Manuel	5th	Ayestas v. Thaler, 462 F.App'x 474, 476 (5th Cir. 2012)	Denied
Basso, Suzanne Margaret	5th	Basso v. Stephens, 555 F.App'x 335, 337 (5th Cir. 2014)	Denied
Battaglia, John David	5th	Battaglia v. Stephens, 621 F.App'x 781, 787 (5th Cir. 2015)	Denied
Beatty, Tracy Lane	5th	Beatty v. Stephens, 759 F.3d 455, 458 (5th Cir. 2014)	Denied
Bigby, James Eugene	5th	Bigby v. Stephens, 595 F.App'x 350, 351 (5th Cir. 2014)	Denied
Blue, Carl Henry	5th	Blue v. Thaler, 665 F.3d 647, 670 (5th Cir. 2011)	Denied
Bower, Lester Leroy	5th	In re Bower, 612 F.App'x 748, 750 (5th Cir. 2015)	Denied
Brawner, Jan Michael	5th	Brawner v. Epps, 439 F.App'x 396, 398 (5th Cir. 2011)	Denied
Braziel, Alvin Avon Jr.	5th	Braziel v. Stephens, No. 15-70018, 2015 WL 7729400, at *1 (5th Cir. Nov. 30, 2015)	Denied
Brown, Arthur	5th	Brown v. Thaler, 684 F.3d 482, 486 (5th Cir. 2012)	Denied
Burton, Arthur Lee	5th	Burton v. Stephens, 543 F.App'x 451, 453 (5th Cir. 2013)	Denied
Butler, Steven Anthony	5th	Butler v. Stephens, No. 09-70003, 2015 WL 5235206, at *4 (5th Cir. Sept. 9, 2015)	Granted, Circuit
Byrom, Michelle	5th	Byrom v. Epps, 518 F.App'x 243, 244 (5th Cir. 2013)	Granted, District
Canales, Anibal	5th	Canales v. Stephens, 765 F.3d 551, 559 (5th Cir. 2014)	Granted, District

[1] In Charles v. Stephens, the Fifth Circuit held that it had jurisdiction over petitioner's motion, although the district court denied his request for a COA, because a denial of a motion under 18 U.S.C. § 3599(f) is an appealable order and not subject to the COA requirement. 612 F.App'x 214, 217 (5th Cir. 2015). Therefore, even though the district court "denied" petitioner's COA, we have not listed this case in the chart or counted it in the tally of cases.

Cantu, Ivan Abner	5th	Cantu v. Thaler, 632 F.3d 157, 162 (5th Cir. 2011)	Granted, District
Carter, Tilon Lashon	5th	Carter v. Stephens, 805 F.3d 552, 553 (5th Cir. 2015)	Denied
Charles, Derrick Dewayne	5th	Charles v. Stephens, 736 F.3d 380, 383 (5th Cir. 2013)	Granted, District
Chester, Elroy	5th	Chester v. Thaler, 666 F.3d 340, 356 fn. 7 (5th Cir. 2011)	Granted, District
Clark, Troy	5th	Clark v. Stephens, No. 14-70034, 2015 WL 5730638, at *4 (5th Cir. Oct. 1, 2015)	Granted, Circuit
Clark, Troy	5th	Clark v. Thaler, 673 F.3d 410, 413 (5th Cir. 2012)	Granted, District
Cobb, Richard Aaron	5th	Cobb v. Thaler, 682 F.3d 364, 367 (5th Cir. 2012)	Granted, District
Coleman, Lisa Ann	5th	In re Coleman, 768 F.3d 367, 369 (5th Cir. 2014)	Denied
Coleman, Lisa Ann	5th	Coleman v. Thaler, 716 F.3d 895, 898 (5th Cir. 2013)	Denied
Craig, Dale Dwayne	5th	Craig v. Cain, No. 12-30035, 2013 WL 69128, at *1 (5th Cir. Jan. 4, 2013)	Denied
Crawford, Charles Ray	5th	Crawford v. Epps, 531 F.App'x 511, 516 (5th Cir. 2013)	Granted, District
Crutsinger, Billy Jack	5th	Crutsinger v. Stephens, 576 F.App'x 422, 424 (5th Cir. 2014)	Denied
Doyle, Anthony Dewayne	5th	Doyle v. Stephens, 535 F.App'x 391, 392 (5th Cir. 2013)	Denied
Druery, Marcus Ray Tyrone	5th	Druery v. Thaler, 647 F.3d 535, 537 (5th Cir. 2011)	Denied
Eldridge, Gerald Cornelius	5th	Eldridge v. Stephens, 608 F.App'x 289, 289 (5th Cir. 2015)	Granted, Circuit
Escamilla, Licho	5th	Escamilla v. Stephens, 602 F.App'x 939, 940 (5th Cir. 2015)	Granted, Circuit
Escamilla, Licho	5th	Escamilla v. Stephens, 749 F.3d 380, 383 (5th Cir. 2014)	Granted, Circuit
Feldman, Douglas Alan	5th	Feldman v. Thaler, 695 F.3d 372, 377 (5th Cir. 2012)	Denied
Freeman, James Garrett	5th	Freeman v. Stephens, 614 F.App'x 180, 181 (5th Cir. 2015)	Denied
Garcia, Humberto	5th	Garcia v. Thaler, 440 F.App'x 232, 233 (5th Cir. 2011)	Denied

Leal			
Garcia, Gustavo Julian	5th	Garcia v. Stephens, 793 F.3d 513, 515 (5th Cir. 2015)	Denied
Garcia, Juan Martin	5th	Garcia v. Stephens, 757 F.3d 220, 221 (5th Cir. 2014)	Denied
Garza, Joe Franco	5th	Garza v. Stephens, 575 F.App'x 404, 406 (5th Cir. 2014)	Denied
Garza, Manuel	5th	Garza v. Stephens, 738 F.3d 669, 672 (5th Cir. 2013)	Denied
Garza, Robert Gene	5th	Garza v. Thaler, 487 F.App'x 907, 908 (5th Cir. 2012)	Denied
Gates, Bill Douglas	5th	Gates v. Thaler, 476 F.App'x 336, 337 (5th Cir. 2012)	Denied
Gonzales, Ramiro	5th	Gonzales v. Stephens, 606 F.App'x 767, 768 (5th Cir. 2015)	Denied
Guevara, Gilmar Alexander	5th	Guevara v. Stephens, 577 F.App'x 364, 366 (5th Cir. 2014)	Denied
Gutierrez, Ruben	5th	Gutierrez v. Stephens, 590 F.App'x 371, 373 (5th Cir. 2014)	Denied
Hall, Justen	5th	Hall v. Thaler, 504 F.App'x 269, 270 (5th Cir. 2012)	Denied
Harris, Robert Wayne	5th	Harris v. Thaler, 464 F.App'x 301, 303 (5th Cir. 2012)	Denied
Haynes, Anthony Cardell	5th	Haynes v. Thaler, 438 F.App'x 324, 326 (5th Cir. 2011)	Granted, Circuit
Hearn, Yokamon Lanear	5th	Hearn v. Thaler, 669 F.3d 265, 267 (5th Cir. 2012)	Denied
Henderson, James Lee	5th	Henderson v. Stephens, 791 F.3d 567, 577 (5th Cir. 2015)	Granted, District
Hernandez, Ramiro	5th	Hernandez v. Stephens, 537 F.App'x 531, 533 (5th Cir. 2013)	Granted, District
Hines, Bobby Lee	5th	Hines v. Thaler, 456 F.App'x 357, 358 (5th Cir. 2011)	Denied
Hoffman, Jessie	5th	Hoffman v. Cain, 752 F.3d 430, 434 (5th Cir. 2014)	Granted, District
Holiday, Raphael Deon	5th	Holiday v. Stephens, 587 F.App'x 767, 790 (5th Cir. 2014)	Denied
Ibarra, Ramiro Rubi	5th	Ibarra v. Thaler, 691 F.3d 677, 679 (5th Cir. 2012)	Denied
Ibarra,	5th	Ibarra v. Stephens, 723 F.3d 599, 600 (5th	Granted, Circuit

Ramiro Rubi		Cir. 2013)	
Jackson, Henry Curtis	5th	Jackson v. Epps, 447 F.App'x 535, 537 (5th Cir. 2011)	Granted, District
Jasper, Ray	5th	In re Jasper, 559 F.App'x 366, 368 (5th Cir. 2014)	Granted, Circuit
Jasper, Ray	5th	Jasper v. Thaler, 466 F.App'x 429, 430 (5th Cir. 2012)	Granted, District
Jennings, Robert Mitchell	5th	Jennings v. Stephens, 537 F.App'x 326, 339 (5th Cir. 2013)	Denied
Johnson, Dexter	5th	Johnson v. Stephens, 617 F.App'x 293, 295 (5th Cir. 2015)	Granted, District
Jones, Shelton Denoria	5th	Jones v. Stephens, 612 F.App'x 723, 724 (5th Cir. 2015)	Granted, District
Jones, Shelton Denoria	5th	Jones v. Stephens, 541 F.App'x 399, 400 (5th Cir. 2013)	Denied
Jordan, Richard	5th	Jordan v. Epps, 756 F.3d 395, 398 (5th Cir. 2014)	Denied
Ladd, Robert Charles	5th	Ladd v. Stephens, 748 F.3d 637, 639 (5th Cir. 2014)	Granted, District
Lewis, Rickey Lynn	5th	Lewis v. Thaler, 701 F.3d 783, 785 (5th Cir. 2012)	Granted, District
Loden, Thomas Edwin	5th	Loden v. McCarty, 778 F.3d 484, 493 (5th Cir. 2015)	Granted, District
Manning, Willie Jerome	5th	Manning v. Epps, 688 F.3d 177, 180 (5th Cir. 2012)	Granted, District
Masterson, Richard Allen	5th	Masterson v. Stephens, 596 F.App'x 282, 284 (5th Cir. 2015)	Denied
Matamoros, John Reyes	5th	Matamoros v. Stephens, 783 F.3d 212, 213 (5th Cir. 2015)	Granted, Circuit
Matamoros, John Reyes	5th	Matamoros v. Stephens, 539 F.App'x 487, 489 (5th Cir. 2013)	Granted, Circuit
Mays, Randall Wayne	5th	Mays v. Stephens, 757 F.3d 211, 212 (5th Cir. 2014)	Denied
McCarthy, Kimberly Lagayle	5th	McCarthy v. Thaler, 482 F.App'x 898, 899 (5th Cir. 2012)	Denied
McCoskey, Jamie Bruce	5th	McCoskey v. Thaler, 478 F.App'x 143, 145 (5th Cir. 2012)	Granted, District
McGowan,	5th	McGowen v. Thaler, 675 F.3d 482, 503 (5th	Denied

Roger Wayne		Cir. 2012)	
Mendoza, Moises Sandoval	5th	Mendoza v. Stephens, 783 F.3d 203, 209 (5th Cir. 2015)	Granted, District
Mitchell, William Gerald	5th	Mitchell v. Epps, 641 F.3d 134, 139 (5th Cir. 2011)	Denied
Newbury, Donald Keith	5th	Newbury v. Stephens, 756 F.3d 850, 853 (5th Cir. 2014)	Denied
Newbury, Donald Keith	5th	Newbury v. Thaler, 437 F.App'x 290, 292 (5th Cir. 2011)	Denied
Osborne, Emerson	5th	Osborne v. King, 617 F.App'x 308, 309 (5th Cir.)	Granted, District
Parr, Carroll	5th	Parr v. Thaler, 481 F.App'x 872, 874 (5th Cir. 2012)	Denied
Panetti, Scott Louis	5th	Panetti v. Stephens, 727 F.3d 398, 400 (5th Cir. 2013)	Granted, District
Paredes, Miguel	5th	In re Paredes, 587 F.App'x 805, 807 (5th Cir. 2014)	Denied
Perez, Louis Castro	5th	Perez v. Stephens, 784 F.3d 276, 278 (5th Cir. 2015)	Denied
Perez, Louis Castro	5th	Perez v. Stephens, 745 F.3d 174, 176 (5th Cir. 2014)	Denied
Pruett, Robert Lynn	5th	Pruett v. Thaler, 455 F.App'x 478, 479 (5th Cir. 2011)	Granted, District
Puckett, Larry Matthew	5th	Puckett v. Epps, 641 F.3d 657, 658-59 (5th Cir. 2011)	Granted, Circuit
Quintanilla, John Manuel	5th	Quintanilla v. Thaler, 443 F.App'x 919, 920 (5th Cir. 2011)	Denied
Rayford, William Earl	5th	Rayford v. Stephens, 622 F.App'x 315, 316 (5th Cir. 2015)	Denied
Reed, Rodney	5th	Reed v. Stephens, 739 F.3d 753, 760 (5th Cir. 2014)	Denied
Ripkowski, Britt Allen	5th	Ripkowski v. Thaler, 438 F.App'x 296, 300 (5th Cir. 2011)	Granted, District
Rivas, George	5th	Rivas v. Thaler, 432 F.App'x 395, 396 (5th Cir. 2011)	Denied
Roberson, Robert Leslie	5th	Roberson v. Stephens, 614 F.App'x 124, 125 (5th Cir. 2015)	Granted, Circuit
Roberts, Donnie Lee	5th	Roberts v. Thaler, 681 F.3d 597, 602 (5th Cir. 2012)	Granted, District
Ross, Vaughn	5th	Ross v. Thaler, 511 F.App'x 293, 294 (5th Cir. 2013)	Denied

Ruiz, Rolando	5th	Ruiz v. Stephens, 728 F.3d 416, 418 (5th Cir. 2013)	Denied
Russeau, Gregory	5th	Russeau v. Stephens, 559 F.App'x 342, 348 (5th Cir. 2014)	Granted, District
Sells, Tommy Lynn	5th	Sells v. Stephens, 536 F.App'x 483, 484 (5th Cir. 2013)	Denied
Simmons, Donald Ray	5th	Simmons v. Thaler, 440 F.App'x 237, 238 (5th Cir. 2011)	Granted, Circuit
Simmons, Gary Cari	5th	Simmons v. Epps, 654 F.3d 526, 533 (5th Cir. 2011)	Granted, Circuit
Simon, Robert	5th	Simon v. Epps, 463 F.App'x 339, 340 (5th Cir. 2012)	Granted, District
Sprouse, Kent William	5th	Sprouse v. Stephens, 748 F.3d 609, 615 (5th Cir. 2014)	Granted, District
Storey, William	5th	Storey v. Stephens, 606 F.App'x 192, 193 (5th Cir. 2015)	Denied
Swain, Mario	5th	Swain v. Thaler, 466 F.App'x 393, 394 (5th Cir. 2012)	Granted, District
Tabler, Richard Lee	5th	Tabler v. Stephens, 588 F.App'x 297, 298 (5th Cir. 2014)	Denied
Tamayo, Edgar Arias	5th	Tamayo v. Stephens, 740 F.3d 991, 992 (5th Cir. 2014)	Denied
Tamayo, Edgar Arias	5th	Tamayo v. Stephens, 740 F.3d 986, 987 (5th Cir. 2014)	Granted, District
Tercero, Bernardo Aban	5th	Tercero v. Stephens, 738 F.3d 141, 143 (5th Cir. 2013)	Denied
Threadgill, Ronnie Paul	5th	In re Threadgill, 522 F.App'x 236, 238 (5th Cir. 2013)	Denied
Threadgill, Ronnie Paul	5th	Threadgill v. Thaler, 425 F.App'x 298, 299 (5th Cir. 2011)	Granted, District
Trevino, Carlos	5th	Trevino v. Thaler, 449 F.App'x 415, 416 (5th Cir. 2011)	Granted, District
Trottie, Willie Tyrone	5th	Trottie v. Stephens, 720 F.3d 231, 237 (5th Cir. 2013)	Denied
Trottie, Willie Tyrone	5th	Trottie v. Stephens, 581 F.App'x 436, 437 (5th Cir. 2014)	Denied
Turner, Edwin Hart	5th	Turner v. Epps, 12 F.App'x 696, 698 (5th Cir. 2011)	Denied
Vasquez, Manuel	5th	Vasquez v. Thaler, 505 F.App'x 319, 323 (5th Cir. 2013)	Denied
Villanueva, Jorge	5th	Villanueva v. Stephens, 555 F.App'x 300, 309 (5th Cir. 2014)	Granted, Circuit
Ward, Adam	5th	Ward v. Stephens, 777 F.3d 250, 253 (5th	Denied

Kelly		Cir. 2015)	
Washington, Willie Terlon	5th	Washington v. Stephens, 551 F.App'x 122, 123 (5th Cir. 2014)	Granted, Circuit
White, Garcia Glenn	5th	In re White, 602 F.App'x 954, 957 (5th Cir. 2015)	Denied
White, Garcia Glenn	5th	White v. Thaler, 522 F.App'x 236, 238 (5th Cir. 2013)	Denied
Wilkins, Christopher Chubasco	5th	Wilkins v. Stephens, 560 F.App'x 299, 301 (5th Cir. 2014)	Denied
Williams, Clifton Lamar	5th	Williams v. Stephens, 761 F.3d 561, 565 (5th Cir. 2014)	Denied
Williams, Perry Eugene	5th	Williams v. Stephens, 575 F.App'x 380, 382 (5th Cir. 2014)	Granted, District
Wilson, Marvin Lee	5th	Wilson v. Thaler, 450 F.App'x 369, 371 (5th Cir. 2011)	Granted, District
Wood, Jeffrey Lee	5th	Wood v. Stephens, 619 F.App'x 304, 305 (5th Cir. 2015)	Granted, Circuit
Woodard, Robert Lee	5th	Woodard v. Thaler, 414 F.App'x 675, 676 (5th Cir. 2011)	Denied
Young, Clinton Lee	5th	Young v. Stephens, 795 F.3d 484, 490 (5th Cir. 2015), as revised (July 30, 2015)	Denied
Yowell, Michael John	5th	Yowell v. Thaler, 545 F.App'x 311, 313 (5th Cir. 2013)	Denied
		Total Granted:	**53 (41.1%)**
		Total Denied:	**76 (58.9%)**

Eleventh Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Adkins, Ricky D.	11th	Adkins v. Warden, Holman CF, 710 F.3d 1241, 1243-44 (11th Cir. 2013)	Granted, Circuit
Anderson, Fred	11th	Anderson v. Sec'y, Fla. Dep't of Corr., 752 F.3d 881, 902 (11th Cir. 2014)	Granted, Circuit
Arthur, Thomas D.	11th	Arthur v. Thomas, 739 F.3d 611, 627 (11th Cir.)	Granted, Circuit
Banks, Chadwick	11th	Banks v. Sec'y, Fla. Dep't of Corr., 491 F.App'x 966, 969 (11th Cir. 2012)	Granted, District
Barwick, Darryl Brian	11th	Barwick v. Sec'y, Fla. Dep't of Corr., 794 F.3d 1239, 1243 (11th Cir. 2015)	Granted, Circuit
Bates, Kayle Barrington	11th	Bates v. Sec'y, Fla. Dep't of Corr., 768 F.3d 1278, 1283 (11th Cir. 2014)	Granted, Circuit
Belcher, James	11th	Belcher v. Sec'y, Dep't of Corr., 427 F.App'x 692, 692 (11th Cir. 2011)	Granted, Circuit
Bell, Michael	11th	Bell v. Fla. Atty. Gen., 461 F.App'x 843, 845 (11th Cir. 2012)	Granted, District
Bishop, Joshua Daniel	11th	Bishop v. Warden, GDCP, 726 F.3d 1243, 1253 (11th Cir. 2013)	Granted, Circuit
Blanco, Omar	11th	Blanco v. Sec'y, Fla. Dep't of Corr., 688 F.3d 1211, 1226 (11th Cir. 2012)	Granted, District
Bolin, Oscar Ray	11th	In re Bolin, No. 15-15710-P, 2016 WL 51227, at *7 fn. 4 (11th Cir. Jan. 4, 2016)	Granted, District
Booker, Stephen	11th	Booker v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1121, 1122 (11th Cir. 2012)	Granted, Circuit
Borden, Jeffrey Lynn	11th	Borden v. Allen, 646 F.3d 785, 807 (11th Cir. 2011)	Granted, District
Boyd, Anthony	11th	Boyd v. Comm'r, Ala. Dep't of Corr., 697 F.3d 1320, 1330 (11th Cir. 2012)	Granted, Circuit
Brannan, Andrew H.	11th	Brannan v. GDCP Warden, 541 F.App'x 901, 902 (11th Cir. 2013)	Granted, Circuit
Brooks, Christopher Eugene	11th	Brooks v. Comm'r, Ala. Dep't of Corr., 719 F.3d 1292, 1299 (11th Cir. 2013)	Granted, Circuit
Burgess, Raymond	11th	Burgess v. Terry, 478 F.App'x 597, 601 (11th Cir. 2012)	Granted, Circuit
Burns, Daniel	11th	Burns v. Sec'y, Fla. Dep't of Corr., 720 F.3d 1296, 1302 (11th Cir. 2013)	Granted, Circuit
Carrillo, Raul	11th	Carrillo v. Sec'y, Fla. Dep't of Corr., 477 F.App'x 546, 548 (11th Cir. 2012)	Granted, District
Chavez, Juan Carlos	11th	Chavez v. Sec'y Fla. Dep't of Corr., 647 F.3d 1057, 1060 (11th Cir. 2011)	Granted, District

Conner, John Wayne	11th	Conner v. GDCP Warden, 784 F.3d 752, 756 (11th Cir. 2015)	Granted, Circuit
Conner, John Wayne	11th	Conner v. Hall, 645 F.3d 1277, 1286 (11th Cir. 2011)	Granted, Circuit
Connor, Sebart Nelson	11th	Connor v. Sec'y, Fla. Dep't of Corr., 713 F.3d 609, 611 (11th Cir. 2013)	Granted, Circuit
Consalvo, Robert	11th	Consalvo v. Sec'y for Dep't of Corr., 664 F.3d 842, 843 (11th Cir. 2011)	Granted, District
Cook, Andrew Allen	11th	Cook v. Warden, Ga. Diagnostic Prison, 677 F.3d 1133, 1136 (11th Cir. 2012)	Granted, District
Cooper, Richard	11th	Cooper v. Sec'y, Dep't of Corr., 646 F.3d 1328, 1330-31 (11th Cir. 2011)	Granted, District
Cox, Allen W.	11th	Cox v. McNeil, 638 F.3d 1356, 1360 (11th Cir. 2011)	Granted, Circuit
Damren, Floyd	11th	Damren v. Florida, 776 F.3d 816, 820 (11th Cir. 2015)	Granted, District
Downs, Ernest Charles	11th	Downs v. Sec'y, Fla. Dep't of Corr., 738 F.3d 240, 256 (11th Cir. 2013)	Granted, Circuit
Evans, Paul H.	11th	Evans v. Sec'y, Fla. Dep't of Corr., 699 F.3d 1249, 1255 (11th Cir. 2012)	Granted, Circuit[2]
Evans, Wydell	11th	Evans v. Sec'y, Fla. Dep't of Corr., 681 F.3d 1241, 1251 (11th Cir.)	Granted, District
Everett, Paul Glen	11th	Everett v. Sec'y, Fla. Dep't of Corr., 779 F.3d 1212, 1218 (11th Cir. 2015)	Granted, Circuit
Farina, Anthony Joseph	11th	Farina v. Sec'y, Fla. Dep't of Corr., 536 F.App'x 966, 970 (11th Cir. 2013)	Granted, Circuit
Ferguson, John	11th	Ferguson v. Sec'y, Fla. Dep't of Corr., 716 F.3d 1315, 1330 (11th Cir. 2013)	Granted, District
Ferrell, Eric Lynn	11th	Ferrell v. Hall, 640 F.3d 1199, 1222-23 (11th Cir. 2011)	Granted, Circuit
Floyd, Maurice Lamar	11th	Floyd v. Sec'y, Fla. Dep't of Corr., No. 13-13566, 2016 WL 231484, at *1 (11th Cir. Jan. 20, 2016)	Granted, Circuit
Fults, Kenneth Earl	11th	Fults v. GDCP Warden, 764 F.3d 1311, 1312 (11th Cir. 2014)	Granted, Circuit
Gissendaner, Kelly Renee	11th	Gissendaner v. Seaboldt, 735 F.3d 1311, 1316 (11th Cir. 2013)	Granted, District
Gore, Marshall Lee	11th	Gore v. Crews, 720 F.3d 811, 814 (11th Cir. 2013)	Granted, District
Gonzalez,	11th	Gonzalez v. Sec'y, Fla. Dep't of Corr.,	Granted, District

[2] The district court granted Mr. Evans habeas relief from his death sentence. The State appealed this ruling and the district court granted Mr. Evans a COA on two of his claims. The Court of Appeals expanded Mr. Evan's COA. Because petitioner's sentencing relief was not final when his COA was granted, we counted Mr. Evans as being under a death sentence and thus meeting the criteria for inclusion.

Ricardo		629 F.3d 1219, 1220 (11th Cir. 2011)	
Greene, Daniel	11th	Greene v. Upton, 644 F.3d 1145, 1153 (11th Cir. 2011)	Granted, Circuit
Griffin, Michael Allen	11th	Griffin v. Sec'y, Fla. Dep't of Corr., 787 F.3d 1086, 1087 (11th Cir. 2015)	Denied
Grim, Norman Mearle	11th	Grim v. Sec'y, Fla. Dep't of Corr., 705 F.3d 1284, 1286 (11th Cir. 2013)	Denied
Gudinas, Thomas Lee	11th	Gudinas v. Sec'y, Dep't of Corr., 436 F.App'x 895, 896 (11th Cir. 2011)	Granted, Circuit
Hardy, John Milton	11th	Hardy v. Comm'r, Ala. Dep't of Corr., 684 F.3d 1066, 1073 (11th Cir. 2012)	Granted, District
Harvey, Harold Lee	11th	Harvey v. Warden, Union Corr. Inst., 629 F.3d 1228, 1237 (11th Cir. 2011)	Granted, District
Heath, Ronald Palmer	11th	Heath v. Sec'y, Fla. Dep't of Corr., 717 F.3d 1202, 1204 (11th Cir. 2013)	Granted, District
Henry, George Russell	11th	Henry v. Warden, Ga. Diagnostic Prison, 750 F.3d 1226, 1230 (11th Cir. 2014)	Granted, District
Hitchcock, James	11th	Hitchcock v. Sec'y, Fla. Dep't of Corr., 745 F.3d 476, 480 (11th Cir. 2014)	Granted, Circuit
Hittson, Travis Clinton	11th	Hittson v. GDCP Warden, 759 F.3d 1210, 1217 (11th Cir. 2014)	Granted, Circuit
Holland, Albert Jr.	11th	Holland v. Florida, 775 F.3d 1294, 1305 (11th Cir. 2014)	Granted, Circuit
Holsey, Robert Wayne	11th	Holsey v. Warden, Ga. Diagnostic Prison, 694 F.3d 1230, 1231 (11th Cir. 2012)	Granted, District
Howell, Paul A.	11th	Howell v. Sec'y, Fla. Dep't of Corr., 730 F.3d 1257, 1260 (11th Cir. 2013)	Granted, District
Hunt, Gregory	11th	Hunt v. Comm'r, Ala. Dep't of Corr., 666 F.3d 708, 720 (11th Cir. 2012)	Granted, District
Israel, Connie Ray	11th	Israel v. Sec'y, Fla. Dep't of Corr., 517 F.App'x 694, 695 (11th Cir. 2013)	Granted, District
Johnson, Marcus Ray	11th	Johnson v. Warden, Ga. Diagnostic & Classification Prison, 805 F.3d 1317, 1323 (11th Cir. 2015)	Denied
Johnson, Marcus Ray	11th	Johnson v. Warden, 808 F.3d 1275, 1283 (11th Cir. 2015)	Denied
Johnson, Terrell M.	11th	Johnson v. Sec'y, Dep't of Corr., 643 F.3d 907, 911 (11th Cir. 2011)	Granted, Circuit
Jones, Brandon Astor	11th	Jones v. GDCP Warden, 753 F.3d 1171, 1181 (11th Cir. 2014)	Granted, District
Jones, Randall Scott	11th	Jones v. Sec'y, Dep't of Corr., 644 F.3d 1206, 1208 (11th Cir. 2011)	Granted, Circuit
Kilgore, Dean	11th	Kilgore v. Sec'y, Fla. Dep't of Corr., 805 F.3d 1301, 1308-09 (11th Cir. 2015)	Granted, Circuit
Kuenzel,	11th	Kuenzel v. Comm'r, Ala. Dep't of Corr.,	Granted, District

William Earnest		690 F.3d 1311, 1314 (11th Cir. 2012)	
Lambrix, Cary Michael	11th	Lambrix v. Sec'y, Fla. Dep't of Corr., 756 F.3d 1246, 1258 (11th Cir.)	Denied
Lawrence, Jonathan Huey	11th	Lawrence v. Sec'y, Fla. Dep't of Corr., 700 F.3d 464, 476 (11th Cir. 2012)	Granted, Circuit
Lee, Jeffrey	11th	Lee v. Comm'r, Ala. Dep't of Corr., 726 F.3d 1172, 1191 (11th Cir. 2013)	Granted, District
Lucas, Harold Gene	11th	Lucas v. Sec'y, Dep't of Corr., 682 F.3d 1342, 1351 (11th Cir. 2012)	Granted, District
Lucas, Daniel Anthony	11th	Lucas v. Warden, Ga. Diagnostic & Classification Prison, 771 F.3d 785, 790 (11th Cir. 2014)	Granted, Circuit
Lugo, Daniel	11th	Lugo v. Sec'y, Fla. Dep't of Corr., 750 F.3d 1198, 1201 (11th Cir. 2014)	Granted, Circuit
Lynch, Richard E.	11th	Lynch v. Sec'y, Fla. Dep't of Corr., 776 F.3d 1209, 1217 (11th Cir. 2015)	Granted, Circuit
Madison, Vernon	11th	Madison v. Comm'r, Ala. Dep't of Corr., 677 F.3d 1333, 1335 (11th Cir. 2012)	Granted, Circuit
Madison, Vernon	11th	Madison v. Comm'r, Ala. Dep't of Corr., 761 F.3d 1240, 1241 (11th Cir. 2014)	Granted, Circuit
McNabb, Torrey Twane	11th	McNabb v. Comm'r Ala. Dep't of Corr., 727 F.3d 1334, 1335 (11th Cir. 2013)	Granted, District
McWilliams, James E.	11th	McWilliams v. Comm'r, Ala. Dep't of Corr., No. 13-13906, 2015 WL 8950641, at *1 (11th Cir. Dec. 16, 2015)	Granted, Circuit
Melton, Antonio Lebaron	11th	Melton v. Sec'y, Fla. Dep't of Corr., 778 F.3d 1234, 1235 (11th Cir.)	Denied
Mendoza, Marbel	11th	Mendoza v. Sec'y, Fla. Dep't of Corr., 761 F.3d 1213, 1215 (11th Cir. 2014)	Granted, Circuit
Morris, Robert	11th	Morris v. Sec'y, Dep't of Corr., 677 F.3d 1117, 1125 (11th Cir. 2012)	Granted, Circuit
Morton, Alvin Leroy	11th	Morton v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1157, 1165 (11th Cir. 2012)	Granted, Circuit
Myers, Ro[illegible] D.	11th	Myers v. Allen, 420 F.App'x 924, 927 (11th Cir. 2011)	Granted, District
Owen, Donald Eugene	11th	Owen v. Fla. Dep't of Corr., 686 F.3d 1181, 1191-92 (11th Cir. 2012)	Granted, District
Pietri, Norberto	11th	Pietri v. Fla. Dep't of Corr., 641 F.3d 1276, 1279 (11th Cir. 2011)	Granted, District
Ponticelli, Anthony John	11th	Ponticelli v. Sec'y, Fla. Dep't of Corr., 690 F.3d 1271, 1291 (11th Cir. 2012)	Granted, District
Pooler, Leroy	11th	Pooler v. Sec'y, Fla. Dep't of Corr., 702 F.3d 1252, 1268 (11th Cir. 2012)	Granted, District
Preston,	11th	Preston v. Sec'y, Fla. Dep't of Corr., 785	Granted, Circuit

Robert Anthony		F.3d 449, 451 (11th Cir. 2015)	
Price, Christopher Lee	11th	Price v. Allen, 679 F.3d 1315, 1319 (11th Cir. 2012)	Granted, Circuit
Pulatti, Carl	11th	Pulatti v. Sec'y, Fla. Dep't of Corr., 732 F.3d 1255, 1259 (11th Cir. 2013)	Granted, Circuit
Ray, Domenique	11th	Ray v. Ala. Dep't of Corr., No. 13-15673, 2016 WL 66534, at *3 (11th Cir. Jan. 6, 2016)	Granted, Circuit
Reese, John Loveman	11th	Reese v. Sec'y, Fla. Dep't of Corr., 675 F.3d 1277, 1286 (11th Cir. 2012)	Granted, District
Roberts, David Lee	11th	Roberts v. Comm'r, Ala. Dep't of Corr., 677 F.3d 1086, 1088 (11th Cir. 2012)	Granted, Circuit
Rodriguez, Manuel Antonio	11th	Rodriguez v. Sec'y, Fla. Dep't of Corr., 756 F.3d 1277, 1280 fn. 5 (11th Cir. 2014)	Granted, District
Rose, Milo A.	11th	Rose v. McNeil, 634 F.3d 1224, 1240 (11th Cir. 2011)	Granted, Circuit
Rozzelle, Roger Allen	11th	Rozzelle v. Sec'y, Fla. Dep't of Corr., 672 F.3d 1000, 1009 (11th Cir. 2012)	Granted, District
Samra, Michael Brandon	11th	Samra v. Warden, Donaldson Corr. Facility, No. 14-14869, 2015 WL 5204387, at *11 (11th Cir. Sept. 8, 2015)	Granted, Circuit
San Martin, Pablo	11th	San Martin v. McNeil, 633 F.3d 1257, 1265 (11th Cir. 2011)	Granted, District
Smith, Joseph Clifton	11th	Smith v. Campbell, 620 F.App'x 734, 745 (11th Cir. 2015)	Granted, Circuit
Smith, Ronald Bert	11th	Smith v. Comm'r, Ala. Dep't of Corr., 703 F.3d 1266, 1268 fn. 1 (11th Cir. 2012)	Granted, Circuit
Smithers, Samuel	11th	Smithers v. Sec'y, Fla. Dep't of Corr., 501 F.App'x 906, 907 (11th Cir. 2012)	Granted, Circuit
Stewart, Kenneth A.	11th	Stewart v. Sec'y, Fla. Dep't of Corr., No. 14-11238, 2015 WL 9301490, at *3 (11th Cir. Dec. 22, 2015)	Granted, Circuit
Tanzi, Michael Anthony	11th	Tanzi v. Sec'y, Fla. Dep't of Corr., 772 F.3d 644, 650 (11th Cir. 2014)	Granted, Circuit
Taylor, Michael Shannon	11th	Taylor v. Culliver, No. 13-11179, 2015 WL 4645228, at *1 (11th Cir. Aug. 6, 2015)	Granted, Circuit
Taylor, Perry Alexander	11th	Taylor v. Sec'y, Fla. Dep't of Corr., 760 F.3d 1284, 1293 (11th Cir. 2014)	Granted, Circuit
Terrell, Brian Keith	11th	Terrell v. GDCP Warden, 744 F.3d 1255, 1258 (11th Cir.)	Granted, Circuit
Trepal, George	11th	Trepal v. Sec'y, Fla. Dep't of Corr., 684	Granted, District

James		F.3d 1088, 1107 (11th Cir. 2012)	
Troy, John	11th	Troy v. Sec'y, Fla. Dep't of Corr., 763 F.3d 1305, 1312 (11th Cir. 2014)	Granted, Circuit
Waldrip, Tommy Lee	11th	Waldrip v. Humphrey, 532 F.App'x 878, 879 (11th Cir. 2013)	Granted, Circuit
Walls, Frank A.	11th	Walls v. Buss, 658 F.3d 1274, 1277 (11th Cir. 2011)	Granted, District
Wellons, Marcus A.	11th	Wellons v. Warden, Ga. Diagnostic & Classification Prison, 695 F.3d 1202, 1206 (11th Cir. 2012)	Granted, Circuit
White, Leroy	11th	White v. Jones, 408 F.App'x 292, 293 (11th Cir. 2011)	Denied
Williamson, Dana	11th	Williamson v. Fla. Dep't of Corr., 805 F.3d 1009, 1015 (11th Cir. 2015)	Granted, District
Wilson, Marion Jr.	11th	Wilson v. Warden, Ga. Diagnostic Prison, 774 F.3d 671, 677 (11th Cir. 2014)	Granted, District
Wright, Joel Dale	11th	Wright v. Sec'y, Fla. Dep't of Corr., 761 F.3d 1256, 1260 (11th Cir. 2014)	Granted, District
Zack, Michael Duane	11th	Zack v. Tucker, 666 F.3d 1265, 1267 (11th Cir. 2012)	Granted, District
		Total Granted:	**104 (93.7%)**
		Total Denied:	**7 (6.3%)**

No. _____

IN THE

Supreme Court of the United States

Duane Edward Buck,
Petitioner-Appellant

v.

William Stephens, Director, Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent-Appellee

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I certify that on the 4th day of February, 2016, I served the enclosed MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on Edward L. Marshall, and Fredericka Sargent Assistant Attorneys General, Post-Conviction Unit, Office of the Texas Attorney General, 300 West 15th Street, 8th Floor, Austin, Texas 78701, (512) 463-2191 via email (Edward.Marshall@texasattorneygeneral.gov and fredericka.sargent@texasattorneygeneral.gov) and through the United States Postal Service via email and first-class mail in accordance with Sup. Ct. R. 29(3). All parties required to be served have been served. I am a member of the Bar of this Court.

/s/ Christina A Swarns

Christina A. Swarns
cswarns@naacpldf.org
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
Tel. 212-965-2200
Fax. 212-226-7592

Counsel for Petitioner

No. _____

IN THE

Supreme Court of the United States

DUANE EDWARD BUCK,

Petitioner,

v.

STATE OF TEXAS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I certify that on the 4th day of February, 2016, I served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on Edward L. Marshall, and Fredericka Sargent Assistant Attorney Generals, Post-Conviction Unit, Office of the Texas Attorney General, 300 West 15th Street, 8th Floor, Austin, Texas 78701, via email (Edward.Marshall@texasattorneygeneral.gov and fredericka.sargent@texasattorneygeneral.gov) and through the United States Postal Service via email and first-class mail in accordance with Sup. Ct. R. 29(3). All parties required to be served have been served. I am a member of the Bar of this Court.

Christina A. Swarns
cswarns@naacpldf.org
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
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Counsel for Petitioner

RECORD AND BRIEFS

ORIGINAL

Supreme Court, U.S.
FILED
MAR 21 2016
OFFICE OF THE CLERK

No. 15-8049

IN THE

Supreme Court of the United States

Duane Edward Buck,
Petitioner,
v.

William Stephens, Director, Texas Department of Criminal Justice,
Criminal Institutions Division,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE MCFARLAND
Deputy Attorney General
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QUESTION PRESENTED

The Director waived procedural bars and confessed error in several other cases where Dr. Walter Quijano testified that a defendant's race might contribute to a jury's finding of future dangerousness. *See Saldaño v. Cockrell*, 267 F.Supp.2d 635, 639–40 & n.3 (E.D. Tex. 2003). The Director acknowledges that it is always inappropriate for the State to ask jurors to consider a defendant's race when assessing guilt or imposing punishment, but in Buck's case that is not what happened. Defense counsel both called Dr. Quijano as a witness and sponsored the challenged testimony; thus, this case has always stood apart. *See Buck v. Thaler*, 132 S. Ct. 32, 34 (2011) (Alito, J., respecting the denial of certiorari) ("In four of the six other cases ., the prosecution called Dr. Quijano and elicited the objectionable testimony. In the remaining two cases while the defense called Dr. Quijano, the objectionable testimony was not elicited until the prosecution questioned Dr. Quijano on cross–examination."). Nevertheless, how best to argue for Buck's life presented a difficult task for trial counsel given the violence Buck wrought on the morning of July 30, 1995, without regard for the children in the house, and his behavior in the immediate aftermath. Approaching the case in "relatively oblique and impersonal terms" based on "clinical and statistical data on the question of future dangerousness" was a reasoned strategy decision. *Granados v. Quarterman*, 455 F.3d 529, 535 (5th Cir. 2006).

Having unsuccessfully sought relief pursuant to Federal Rule of Civil Procedure 60(b) in 2011, Buck tried again in 2014. The intervening event was this Court's decision that a procedurally barred claim of ineffectiveness could be overcome with a showing that state habeas counsel was ineffective. Together with trial counsel's alleged ineffectiveness, Buck suggested that this new development should now afford him Rule 60(b) relief because the combination created "extraordinary circumstances." The lower courts rejected his arguments, finding not only that he still had not shown "extraordinary circumstances," but also that he failed to establish constitutionally ineffective assistance at trial.

This procedural posture gives rise to the following question:

> Where a petitioner has failed to establish *both* that reasonable jurists would debate the procedural ruling *and* the denial of a valid constitutional right, did the lower court err in denying a COA?

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BRIEF IN OPPOSITION

Petitioner Duane Edward Buck was found guilty and sentenced to death for murdering Kenneth Butler and Debra Gardner—a mother of two whom Buck shot while her young children watched—during a shooting spree at the home where Debra and her children lived, and where Buck had lived during his and Debra's (tumultuous) relationship. During the punishment phase of Buck's trial, Dr. Quijano, testifying for the *defense*, explained that he considered several factors when evaluating the defendant, including age, sex, race, socio–economic status, and whether there was a history of violence and/or substance abuse. Regarding race, Dr. Quijano testified only that "minorities, Hispanics and blacks" were overrepresented in the criminal justice system. He never tied Buck's race (African–American) to his future dangerousness. The State briefly revisited this testimony on cross–examination, and then never mentioned it again. Ultimately, although he concluded that Buck would not be a future danger if given a life sentence, Dr. Quijano admitted that he "never rule[d] out any probability "[1]

Having unsuccessfully challenged trial counsel's effectiveness for allowing Dr. Quijano's to testify the way he did (first via a federal habeas

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[1] Importantly, Dr. Patrick Lawrence, the other defense expert on future dangerousness, made the same admission: there were "no guarantees." 28 Reporter's Record (RR) 167

petition and later a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)), in 2014, Buck again sought Rule 60(b) relief. This time, he argued that *Martinez v. Ryan*[2] and *Trevino v. Thaler*[3] demand that his procedurally–barred ineffectiveness claims be looked at anew The district court denied his motion, and the Fifth Circuit declined to issue a COA. This appeal follows.

STATEMENT OF THE CASE

I. The Facts of the Crime

The Fifth Circuit accurately summarized the facts of Buck's crime as follows:

> Early on the morning of July 1995, Buck's ex–girlfriend, Debra Gardner, and several of her friends, including Kenneth Butler, his brother, Harold Ebnezer, and Buck's sister, Phyllis Taylor, gathered at [Debra's] house after having spent the previous night playing pool. Buck and [Debra] had ended their relationship about one week earlier. At some point that morning, Buck arrived at the residence, banged on the front door, and kicked it open, after which he argued loudly with [Debra] and struck her before retrieving some of his possessions and leaving.
>
> Several hours later, Buck returned with a rifle and shotgun. After forcing the front door open, Buck fired at—but missed—[Harold], who immediately fled the house through the back door. Buck then approached [Phyllis], pressed the muzzle of the rifle directly against her chest, and fired. [Phyllis] fell to the ground but survived her injuries. As she lay on the ground, [Phyllis] heard

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[2] 132 S. Ct. 1309 (2011).

[3] 133 S. Ct. 1911 (2013).

> several more gunshots coming from the area of the bedrooms. When [Phyllis] was able to stand up and make her way through the house, she discovered [Kenneth's] body slumped over and bleeding in the hallway After hearing the first gunshots, Devon Green, [Debra's] then 11–year–old son who had been sleeping in the back bedroom, hid in the hallway closet. From his hiding place, [Devon] listened as Buck confronted [Kenneth] in the hallway and accused him of sleeping with Buck's "wife." Gunshots followed. Both [Devon] and his teenage sister, Shennel Gardner, ran outside, where they witnessed Buck shoot their mother as she attempted to flee in the street.
>
> Buck then placed both guns in the trunk of his car, which was parked outside [Debra's] residence, and attempted to start the vehicle. When his car did not start, Buck began walking away from the residence. Police arrived just as he was leaving, and both [Devon] and [Harold] identified him as the shooter. Police then took Buck into custody and recovered a shotgun and .22 caliber rifle from the trunk of his car. Both [Debra] and [Kenneth] died from their gunshot wounds.

Buck v. Thaler, 345 F App'x 923, 924–25 (5th Cir. 2009), *cert. denied*, 559 U.S. 1072 (2010).

II. Facts Relating to Punishment

A. The State's case for future dangerousness

At the punishment phase, the State presented evidence that Buck would likely be a future danger. Specifically, the jury heard about Buck's prior criminal history, including convictions for delivery of cocaine, possession of a controlled substance, and unlawfully carrying a weapon. 28 Reporter's Record (RR) 5–28; *see also id.* at 239–43; State's Exhibits (SX) 66–68. Vivian Jackson, Buck's former girlfriend, testified about her own encounters with Buck; she

"testified that Buck had physically abused her on several occasions and once threatened her with a gun." *Buck v. Thaler*, 345 F App'x at 925; *see* 28 RR 31–40. Most damning, however, was the description of Buck's post–arrest behavior—that he was laughing and said "the bitch got what she deserved"—from the arresting officer.[4] 28 RR 50–51.

B. The defense's case in mitigation

Despite Buck's shooting spree during which he killed two and wounded a third (his own sister), his criminal record, and his history of domestic violence, the defense attempted to portray Buck as nonviolent and unlikely to be a future danger. In support of its case, the defense called several witnesses, each of whom testified that they had never known Buck to be violent. 28 RR 77 (Pastor J.C. Neal), 84–85 (Monique Winn, Buck's sister), 93 (Sharon Buck, Buck's step–mother), 96 (James Buck, Buck's father). Buck also called two expert witnesses, each of whom testified that, if imprisoned, Buck would not likely commit additional acts of violence: Dr. Walter Quijano, the chief psychologist for the Texas prison system, 28 RR 101–02, and Dr Patrick Lawrence, a psychologist specializing in the prediction of future criminal behavior, *id.* at 177, 182–85. The heart of their testimony was their opinion

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[4] The jury had already heard that Buck was laughing after being arrested during the trial on guilt/innocence. 26 RR 317 (testimony of Shennel Gardner, Debra's daughter).

that Buck did not pose of continuing threat to society and was therefore a good candidate for a life sentence. These opinions were based on various factors—including Buck's age, the facts of the crime for which he was on trial, and the prison environment. *Id.* at 109–19 (Dr. Quijano), 186–206 (Dr. Lawrence).

Counsel took pains to emphasize Dr. Quijano's extensive experience, especially his tenure as Chief Psychologist and Director of Psychiatric Services for the Texas Department of Criminal Justice. *Id.* at 101–04. Throughout his direct examination, counsel stressed that Dr. Quijano lacked either a pro–defense or a pro–prosecution bias, eliciting testimony that he had testified for the defense and the State. *Id.* at 104–05. In short, defense counsel's primary reason for calling Dr. Quijano was his strategic calculation that the jurors would perceive him to be a fair and unbiased expert who had independently concluded—after evaluating all of the factors he considered relevant (age, sex, race, social economics, history of violence, and history of substance of abuse)—that there was only a very low probability of future dangerousness. *Id.* at 115; *see Buck v. Thaler*, 345 F. App'x at 925 ("Buck and his counsel presumably made this strategic decision because they believed that the potential benefit of Dr. Quijano's ultimate conclusion—that Buck was not likely to pose any future danger to society if he were incarcerated—outweighed any risk of exposing the jury to Dr. Quijano's less favorable opinions.").

III. Direct Appeal and Postconviction Proceedings

Having been indicted for the shooting death of Kenneth Butler and Debra Gardner during the same criminal transaction, Buck was found guilty and sentenced to death. Clerk's Record (CR) 12. Buck's sentence and conviction were affirmed on direct appeal. *Buck v. State*, No. 72,810 (Tex. Crim. App. 1999) (unpublished).

While his direct appeal was pending, Buck filed an application for state habeas relief. SHCR–01[5] 77 The state habeas court issued findings of fact and conclusions of law recommending that relief be denied. *Id.* at 126–27 Before the findings were issued—but after the filing deadline had passed—Buck filed a second state habeas application in which he challenged Dr. Quijano's testimony for the first time,[6] some two and a half years after former Attorney General John Cornyn confessed error in *Saldaño*.[7] SHCR–02 2. The state habeas court found this to be a subsequent application, and pursuant to state

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5 "SHCR" refers to the Clerk's Record of documents and pleadings filed during the state habeas proceedings, followed by "–01" (the first application) and "–02" (the second application) and relevant page numbers.

6 Specifically, Buck alleged (1) that Dr. Quijano's testimony violated his Sixth Amendment right to an impartial jury, the Eight Amendment's prohibition against cruel or unusual punishment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and (2) that trial counsel was constitutionally ineffective for eliciting Dr. Quijano's opinion that minorities are overrepresented in the criminal justice system. SHCR–02 55–62.

7 *See Saldaño v. Cockrell*, 267 F.Supp.2d at 639.

law, directed the district clerk to forward it to the Court of Criminal Appeals. *Id.* at 18–19. That court then disposed of both writ applications, adopting the trial court's findings and conclusions as to the first and denying it on the merits and dismissing the second as an abuse of the writ pursuant to Texas Code of Criminal Procedure Article 11.071, Section 5. *Ex parte Buck*, Nos. 57,004–01, –02 (Tex. Crim. App. Oct. 15, 2003) (per curiam) (unpublished order).

Thereafter, Buck sought federal habeas relief,[8] but the district court granted the Director's motion for summary judgment and denied Buck's request for COA. *See Buck v. Stephens*, Civil Action No. 4:04cv03965 (S.D. Tex. 2006), Docket Entry (DE) 15. The Fifth Circuit also denied a request for a COA.[9] *Buck v. Thaler*, 345 F App'x 923. In so doing, the court not only accepted the procedural bar, it also found the merits of the constitutional claim to be lacking. *Id.* at 930.

More than five years later, and relying primarily on the alleged broken promise made by the former Attorney General, on the eve of his scheduled execution, Buck sought relief from judgment pursuant to Federal Rule of Civil

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[8] In his federal habeas petition, Buck asserted the same claims regarding Dr. Quijano's testimony that he had raised in his state habeas application. *See Buck v. Stephens*, Civil Action No. 4:04cv03965, DE 1 at 55–62.

[9] Buck sought a COA only a single claim: "whether he was deprived of due process or equal protection by the prosecution's reference to Dr. Quijano's testimony citing race as a future dangerousness factor." *Buck v. Thaler*, 345 F App'x at 926.

Procedure 60(b). *Buck v. Stephens*, Civil Action No. 4:04cv03965, DE 27 The district court again rejected his claims. *Id.*, DE 31. A subsequent Rule 59(e) motion was also denied. *Id.*, DE 33, 36. Appeals to the Fifth Circuit and this Court were also unsuccessful.[10] *See Buck v. Thaler*, 452 F App'x 423 (5th Cir. 2011);[11] *Buck v. Thaler*, 132 S. Ct. 32 (2011).[12]

In 2014, based primarily on *Martinez* and *Trevino*, Buck again asked the federal district court to grant federal habeas relief on his ineffectiveness claims regarding Dr. Quijano's testimony, or at the very least, grant his motion so that he could further develop the record.[13] His motion pursuant to Federal Rule of Civil Procedure 60(b), *Buck v. Stephens*, Civil Action No. 4:04cv03965, DE 49, and his motion pursuant to Federal Rule of Civil Procedure 59(e), *id.*, DE 67, were both denied, *id.*, DE 66, 75.[14] The Fifth Circuit declined to issue a COA,

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[10] This Court granted a stay of execution to consider Buck's petition for certiorari review. *Buck v. Thaler*, No. 11A297 (Sept. 15, 2011).

[11] The court reiterated its previous denial of the merits of Buck's constitutional claim. *Buck v. Thaler*, 452 F 'Appx at 432.

[12] A petition for rehearing after the denial of certiorari review was also denied. *Buck v. Thaler*, 132 S. Ct. 1085 (2012).

[13] Prior to seeking Rule 60(b) relief, Buck pursued state habeas relief alleging, *inter alia*, violations of due process and equal protection based on Dr. Quijano's testimony. The Court of Criminal Appeals found this to be an abuse of the writ. *Ex parte Buck*, 418 S.W.3d 98 (Tex. Crim. App. 2013), *cert. denied*, 134 S. Ct. 2663 (2014).

[14] Both times, the district court found Buck's claim that he was denied constitutionally ineffective assistance of counsel to be without merit. *See Buck v. Stephens*, Civil Action No. 4:04cv03965, DE 66 at 11–15; *id.*, DE 75 at 4.

finding that the district court had not abused its discretion. *Buck v. Stephens*, 623 F. App'x 668 (5th Cir. Aug. 20, 2015). Buck's petition for rehearing en banc was also denied. *Buck v. Stephens*, 2015 WL 6874749 (5th Cir. Nov. 6, 2015).

REASONS FOR DENYING CERTIORARI REVIEW

The question Buck presents for review is unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not matter of right, but of jurisdictional discretion, and will be granted only for "compelling reasons." An example of such a "compelling reason" would be if the court of appeals entered a decision of an important question of federal law that conflicts with a decision of another court of appeals or with relevant decisions of this Court. Buck advances no such special or important reason in this case, and none exists.

Further, as a jurisdictional prerequisite to obtaining appellate review, Buck was first required to obtain a COA. 28 U.S.C. § 2253(c)(1)(A); *Miller–El v. Cockrell*, 537 U.S. 322, 335–36 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). The standard to be applied in determining when a COA should issue examines whether a petitioner "has made a substantial showing the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller–El*, 537 U.S. 336. This standard "includes showing that reasonable jurists could debate (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement

to proceed further." *Slack*, 529 U.S. at 484 (internal quotation marks and citation omitted); *cf. Harrington v. Richter*, 562 U.S. 86, 101 (2011) ("A state court's determination that the claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision.") (citation omitted).

As the lower court explained:

> The district court denied the motion for a procedural reason, namely Buck's failure to show extraordinary circumstances under Rule 60(b)(6). We therefore must deny a COA if Buck fails to establish *both* (1) that jurists of reason would find debatable "whether the petition states a valid claim of the denial of a constitutional right" *and* (2) that those jurists "would find debatable whether the district court was correct in its procedural ruling." *Slack* [], 529 U.S. [at] 484, [].

Buck v. Stephens, 623 F. App'x at 671–72 (emphasis added). Importantly, because the procedural decision was the denial of a 60(b) motion, Buck had to show that the district court abused its discretion in so doing. *See Kellogg v. Strack*, 269 F.3d 100, 104 (2d Cir. 2001) (per curiam); *see also Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011) ("The decision to grant or deny relief under Rule 60(b) lies within the sound discretion of the district court and will only be reversed for an abuse of that discretion." (internal quotation marks and citation omitted).

For the reasons discussed below, Buck has entirely failed to establish that he was entitled to a COA. Thus, certiorari review is not warranted.

I. Because Buck Failed to Establish "Extraordinary Circumstances," the Lower Court Properly Denied a COA.

While considered a "grand reservoir of equitable power to do justice," Rule 60(b) relief is only available if "extraordinary circumstances" are present. *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (internal quotation marks and citation omitted). But "[s]uch circumstances will rarely occur in the habeas context." *Id.* Here, in addition to previously rejected facts Buck has argued as "extraordinary circumstances"—counsel's ineffectiveness and the alleged "broken promise" made by former Attorney General Cornyn—he has added only the change in decisional law pursuant to *Martinez* and *Trevino*.[15] These cases change nothing.

As a preliminary matter, Buck makes mutually exclusive arguments when contending that the lower court erred in its consideration of whether he had demonstrated "extraordinary circumstances." First, he states unequivocally, "The panel's *sole inquiry* should have been whether a reasonable jurist could conclude that Mr. Buck's [ineffectiveness] claim is remarkable, or that Texas's broken promise is not just 'odd and factually unusual,' but extraordinary." Petition at 25 (emphasis added). Then he says

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[15] Additional factors not specifically argued in Buck's previous motion for relief from judgment include: (1) the trial court qualified Dr. Quijano as an expert, allowed him to testify as he did, and admitted his "excludable hearsay report linking race to dangerousness," and (2) the "Fifth Circuit held Mr. Buck's trial counsel responsible for the introduction of Dr. Quijano's testimony." *Compare Buck v. Stephens*, 623 F. App'x at 672, *with Buck v. Stephens*, Civil Action No. 4:04cv03965, DE 27 at 6–15.

that the lower court erred because it did not follow an "equitable, holistic approach" and consider *all of the circumstances together*, but instead "went through the factors one by one, and determined that each was not extraordinary; and, in so doing, dilut[ed] [the] full weight of the circumstances identified by Mr. Buck." *Id.* at 27 (emphasis added, internal quotation marks and citation omitted). He cannot have it both ways. In any event, if each circumstance standing alone is not extraordinary, the combination of them cannot be extraordinary.

A. A change in decisional law is not an "extraordinary circumstance."

Buck's ineffectiveness claim is procedurally barred because the Court of Criminal Appeals dismissed it as an abuse of the writ. When he first raised this claim in federal court, no case held that cause and prejudice could be shown by establishing state habeas counsel's ineffectiveness. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (explaining that because there is no constitutional right to postconviction proceedings, there can be no attendant right to effective assistance of counsel in those proceedings). But "[i]t is hardly surprising that, subsequently, after petitioner's case was no longer pending, this Court arrived at a different [conclusion]."[16] *Gonzalez*, 545 U.S. at 536. For

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[16] Thus, Buck's contention that his ineffectiveness claims were procedurally barred during his initial federal habeas proceedings can hardly be considered "extraordinary." *See Buck v. Stephens*, 623 F. App'x at 673; *see also Gonzalez*, 545

this reason, a change in decisional law cannot be an "extraordinary circumstance." *Id.* As the lower court explained in *Adams v. Thaler*:

> Our precedents hold that "[a] change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone a ground for relief from final judgment" under Rule 60(b). *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir. 1990) (citations omitted); *see also Batts v. Tow–Motor Forklift Co.*, 66 F.3d 743, 747–48 (5th Cir. 1995). We have held that "[t]his rule applies with equal force in habeas proceedings under the Antiterrorism and Effective Death Penalty Act (AEDPA). *Hernandez* [], 630 F.3d [at] 430 []; *see Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002) ("Under our precedents, changes in decisional law . . . do not constitute the 'extraordinary circumstances' required for granting Rule 60(b) relief. . . . The dicta in *Batts* suggesting that the rule for changes in decisional law might be different in the habeas corpus context because finality is not a concern is now flatly contradicted by, among other things, AEDPA.").

679 F.3d 312, 319–20 (5th Cir. 2012). *Adams* then specifically rejected the argument that *Martinez* constituted an "extraordinary circumstance" warranting Rule 60(b)(6) relief. *Id.* at 320; *see also Diaz v. Stephens*, 731 F.3d 370, 375–77 (5th Cir.) (holding that *Trevino* "does not change [*Adams*'s] conclusion in any way"), *cert. denied*, 134 S. Ct. 48 (2013).[17]

U.S. at 537 ("The District Court's interpretation was by all appearances correct under the Eleventh Circuit's then–prevailing interpretation of 28 U.S.C. § 2254(d)(2).").

[17] The *Gonzalez* Court explained that the decisional change in the law at issue there was "all the less extraordinary in petitioner's case because of his lack of diligence in pursuing" an appeal. 545 U.S. at 537. The same could be said of Buck. *Trevino* was handed down on May 25, 2013. Buck waited until January 2014 (despite the fact that nothing else about the circumstances of his case has changed since 2002) to pursue relief from judgment under Rule 60(b); instead, he chose to pursue state habeas relief. *See Ex parte Buck*, 418 S.W.3d 98.

B. The additional factors listed by Buck are not extraordinary.

Primarily, the lower court rejected the notion that a claim of ineffective assistance of counsel makes a case extraordinary. *Id.* at 673 ("Buck's case is no different in kind or degree from other disagreements over trial strategy between a lawyer and client that it counts as an exceptional case."). In his petition, as he has in every pleading before every court, Buck asserts that his is not an ordinary claim of ineffectiveness, however, because trial counsel inserted race into the proceedings, which "undermined the integrity of both [Buck's] death sentence and the criminal justice system overall." He then castigates the panel for not acknowledging this, as well for not acknowledging race. Petition at 24, 28, 30, 32. But as explained below, this claim has been repeatedly and exhaustively reviewed by the lower courts. And at every turn, the underlying facts have been found insufficient to warrant relief. If Buck cannot obtain relief on the merits of this argument, then he surely cannot establish that constitutes an "extraordinary circumstance."

Buck also relies, as he has in every pleading before every court, on his argument that the Texas Attorney General broke a promise to allow Buck to be resentenced. *Id.* at 25, 32–33. First, as the lower court recognized, this "fact has never been adequately established." *Buck v. Stephens*, 623 F App'x at 673; *see also id.* at 670 n.1 ("[W]e have found no statement by the AG in the record

in which he confessed error relating to Buck's case and promised not to raise procedural defenses."). The court further explained that Buck has never shown "why the alleged reneging would justify relief from judgment;" "he has not shown that he relied on the alleged promise to his detriment." *Id.* at 10; *see Buck v. Stephens*, Civil Action No. 4:04cv03965, DE 31 at 8 (in denying his first Rule 60(b) motion, district court explained that "Buck has identified no legal basis for a claim that the Attorney General's statement created legally enforceable rights or that it precluded the Attorney General from later identifying distinguishing facts that made their initial assessment inapplicable to this case."), DE 75 at 10; *see also Ackerman v. United States*, 340 U.S. 193, 198 (1950) (affirming the denial of Rule 60(b) relief because, among other things, petitioner "had no right to repose confidence in Kelley, a stranger. There is no allegation of any fact or circumstance which shows that Kelley had any undue influence over petitioner or practiced any fraud, deceit, misrepresentation, or duress upon him. There are no allegations of privity or any fiduciary relations existing between them."). Second, a federal habeas petitioner has no right to have the State respond to his allegations in a particular way *Cf. Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998); *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981); *see Buck v. Thaler*, 345 F App'x at 929 ("Because Buck's characterization of 'intra–court comity' finds no support in our precedent, *we decline to apply here concessions*

made by the State in different cases with different facts.") (emphasis added).

More than that, however, Buck's case is *not* like any of the others cited by former Attorney General Cornyn: "In four of the six other cases ., while the defense called Dr. Quijano, the objectionable testimony was not elicited until the prosecution questioned Dr. Quijano on cross–examination. Only in Buck's case did defense counsel elicit the race–related testimony on direct examination. Thus, this is the only case in which it can be said that the responsibility for eliciting the offensive testimony lay squarely with the defense."[18] *Buck v. Thaler*, 132 S. Ct. at 34–35 (Alito, J., respecting the denial of certiorari).

Because Buck cannot establish the "extraordinary circumstances" necessary for Rule 60(b) relief, the district court did not abuse its discretion in denying relief, and the Fifth Circuit properly affirmed that denial. Certiorari relief is, therefore, not warranted.

II. Buck Has Not Established a Valid Claim of the Denial of a Constitutional Right, that is, He Has Not Established Ineffective Assistance of Trial Counsel.

Even if reasonable jurists could debate whether the lower court abused its discretion in denying Buck's Rule 60(b) motion, in order to be entitled to a

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[18] *See Alba v. Johnson*, 232 F.3d 208 (5th Cir. 2000); *Blue v. Johnson*, Civil Action No. 99cv0350 (S.D. Tex. Sept. 29, 2000); *see also Buck v. Stephens*, Civil Action No. 4:04cv03965, DE 33 at Exhibit 2 (excerpt of reporter's record from *State v. Blue*), Exhibit 3 (excerpt of reporter's record from *Alba v. State*).

COA, he must also establish the denial of a valid constitutional claim. This he cannot do.

A. The *Strickland* standard

The Sixth Amendment, together with the Due Process Clause, guarantees a criminal defendant both the right to a fair trial and the right to effective assistance of counsel at that trial. *Strickland*, 466 U.S. at 684–86. A defendant's claim that he was denied constitutionally effective assistance requires him to affirmatively both that (1) counsel rendered deficient performance, and (2) counsel's actions resulted in actual prejudice. *Id.* at 687–88, 690. Importantly, failure to prove either deficient performance or resultant prejudice will defeat an ineffective–assistance–of–counsel claim, making it unnecessary to examine the other prong. *Id.* at 687

In order to demonstrate deficient performance, Buck must show that in light of the circumstances as they appeared at the time of the conduct, "counsel's representation fell below an objective standard of reasonableness," i.e., "prevailing professional norms." *Id.* at 688, 690; *see also Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014) (per curiam) (emphasizing that the "performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances") (citation omitted). The Supreme Court has admonished that judicial scrutiny of counsel's performance "must be highly deferential," with "every effort" made to avoid "the distorting effects of

hindsight."[19] *Strickland*, 466 U.S. at 689; *Richter*, 562 U.S. 105 ("It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'") (citations omitted); *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). Accordingly, there is a "strong presumption" that the alleged deficiency "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

Even if deficient performance can be established, Buck must still affirmatively prove prejudice that is "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. This requires him to show a reasonable probability that but for counsel's deficiencies, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is one sufficient to undermine confidence in the outcome. *Id.* As explained by *Richter*: The question concerning *Strickland*'s prejudice analysis "is *not* whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been

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[19] "Representation of a capital defendant calls for a variety of skills. Some involve technical proficiency connected with the science of law. Other demands relate to the art of advocacy. The proper exercise of judgment with respect to the tactical and strategic choices that must be made in the conduct of a defense cannot be neatly plotted in advance by appellate courts." *Stanley v. Zant*, 697 F.2d 955, 970 & n.12 (11th Cir. 1983).

established [had] counsel acted differently." 562 U.S. at 111 (emphasis added and citation omitted). Rather. "[t]he likelihood of a different result must be substantial, not just conceivable." *Id.* at 112 (citation omitted).

Finally, with respect to errors at the sentencing phase of a death penalty trial, the relevant prejudice inquiry is "whether there is a reasonable probability, that absent the errors, the sentencer [] would have concluded the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

B. Trial counsel was not deficient.

Buck contends that trial counsel was deficient in two ways. First, counsel allowed Dr. Quijano to testify knowing that one of the factors he considered in assessing future dangerousness was a defendant's race. Second, no objection was made either when the State revisited the issue during cross–examination or when the State asked the jurors to consider Dr. Quijano's testimony during closing argument. *See, e.g.*, *Buck v. Stephens*, Civil Action No. 4:04cv03956, DE 49 at 19–21.

While the law rightly imposes multiple restrictions on the State's ability to introduce evidence, far fewer restrictions are imposed on the defendant. *See United States v. Fairchild*, 505 F.2d 1378, 1383 (5th Cir. 1975) (explaining that many, if not most, "[c]onstitutional rights, like others, may be waived; and a criminal defendant may, by his conduct, make other constitutionally

inadmissible evidence admissible for certain purposes") (citation omitted). For example, a criminal defendant might wish to rely on apparently unseemly or inappropriate evidence, i.e., poverty or culture, to explain a poor choice, even when the State would not be permitted to argue those factors as either evidence of guilt or aggravating for purposes of sentencing. *See Tuilaepa v. California*, 512 U.S. 967, 983 (1994) (Stevens, J., concurring) ("In [*Zant v. Stephens*, 462 U.S. 862, 885, 887–89 (1985)], even though the trial judge had incorrectly characterized the defendant's prior history of 'assaultive offenses' as a statutory aggravating circumstance, we found no constitutional error because the evidence supporting that characterization was relevant and admissible.

We made it clear, however, that it would be error for the State to attach the 'aggravating' label to, or otherwise authorize the jury to draw adverse inferences from, 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion or political affiliation of the defendant.'"). To prohibit a defendant from choosing to use such factors could improperly limit his ability to present a defense or a case in mitigation.

Here, the defense's decision to elicit testimony from its own expert reflected a considered choice and a strategic legal decision. *See Buck v. Thaler*, 345 F App'x at 930 ("Buck and his counsel presumably made this strategic determination because they believed that the potential benefit of Dr. Quijano's

ultimate conclusion—that Buck was not likely to pose any future danger to society if incarcerated—outweighed any risk of exposing the jury to Dr Quijano's less favorable opinions."); *see also Granados*, 455 F.3d at 536 ("These are difficult and nuanced decisions the trial lawyer must make."). While the State cannot, and should not, raise the issue of race, defense counsel can and, in fact, has chosen to do so before. The Fifth Circuit held that under those circumstances, any later attempt to claim it as a basis for appeal was precluded:

> The decision by counsel to approach the [future dangerousness] question in the relatively oblique and impersonal terms of quantitative presentation lay at the heart of [the defense team's] trial strategy It included facing the reality that blacks and Latinos had a disproportionate presence in the state prisons, a social phenomenon about which counsel could not assume the jury was ignorant. This approach avoided the necessity of personal testing and examination, the door opener to examination by experts engaged by the State.

Granados, 455 F.3d at 535–36. Unlike the testimony Dr. Quijano gave in Granados's and Buck's trials, the testimony he gave in Saldaño's trial specifically indicated that a defendants' race would make him more likely to be a future danger and that minorities generally are more dangerous. *See Saldaño*, 267 F.Supp.2d at 638–39 ("Quijano testified that Saldaño's Hispanic ethnicity increased the likelihood that he would be a danger in the future. Quijano explained that Hispanics were overrepresented in the Texas prison system, *and to him this fact suggested a correlation between ethnicity and future dangerousness*.") (emphasis added). Where those remarks were

inherently aggravating, Dr. Quijano's brief remarks during his testimony in Buck's trial about "minorities, Hispanics and blacks" being overrepresented in the criminal justice system, 28 RR 111, are inherently mitigating.

C. Buck cannot establish resultant prejudice.

Buck tells this Court that "the State's evidence of future dangerousness was far from overwhelming." Petition at 17 This is a myopic view of the record. As the district court has explained:

> In addition to Buck's past history, the jury was aware of the horrific facts of Buck's murder of [Debra] and [Kenneth]. These included Buck's attempt to murder his own sister, and his murder of [Debra] in front of her two children. The jury also heard that Buck was laughing about the murders when he was arrested, and that he said about [Debra] that 'the bitch deserved what she got.'

Buck v. Stephens, Civil Action No. 4:04cv03965, DE 66 at 12–13; *see also id.*, DE 31 at 6 ("The penalty phase evidence showed that Buck had a history of domestic violence, including threatening his ex–girlfriend with a gun, shot his own sister during the rampage that resulted in the murders of [Debra] and [Kenneth], showed no remorse for the murders, and laughed when asked about the murders.").

Ultimately, the jurors were instructed that they were "not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling in considering all of the evidence before [them] and in answering" the future dangerousness special issue. CR 194. And in closing

argument, the prosecution only reminded the jurors of what they had already heard: "[W]hat [Dr Qujiano] said was that [Buck] was at the low range but the probability did exist that he would be a continuing threat to society " 28 RR 261.

Richter teaches that the likelihood of prejudice must be "substantial," not simply conceivable." 526 U.S. at 112. While a different outcome might be "conceivable" without Dr. Quijano's testimony, that likelihood is simply not "substantial." The jurors heard that Buck was prone to violent outbursts, particularly against women, the most damning being the shooting spree he went on in response to Debra's having left him. Indeed, that he shot Debra—twice, once as she lay dying in the street—in front of her children could only be described as vicious and abhorrent. But his behavior in the aftermath was more vicious and more abhorrent, as he laughed in response to a question by the arresting officer and then said, without remorse, "The bitch got what she deserved."

Because Buck has not shown the denial of a valid constitutional claim, a COA was not warranted. Thus, the lower court did not err, and certiorari review should be denied.

CONCLUSION

There is no question that State-sponsored discrimination is not to be tolerated. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231 (2003); *Turner v Murray*,

476 U.S. 28 (1986); *Zant*, 462 U.S. 862; *Rose v. Mitchell*, 443 U.S. 545 (1979). But what the State cannot do, the defense can. Given the callousness of Buck's crime and his behavior afterward, counsel made the best decision he could. That is, to approach the question of Buck's future dangerousness in terms of clinical and statistical data in an effort to have the case viewed on those terms rather than remain focused on" Buck and his cruelty *Granados*, 455 F.3d at 535.

The responsibility foisted on jurors in a capital murder trial is considerable. We cannot blithely assume they do not take it seriously The Court in *Lockett v. Ohio* presumed that "'jurors confronted with the awesome responsibility of decreeing death for a fellow human [would] act with due regard for the consequences of their decision.'" 438 U.S. 586, 598 (1978) (quoting *McGautha v. California*, 402 U.S. 183, 208 (1971)); *see McClesky v. Kemp*, 481 U.S. 279, 311 (1987) ("[I]t is the jury's function to make the difficult and uniquely human judgments that defy codification and that buil[d] discretion, equity, and flexibility into a legal system.") (internal quotation marks and citation omitted). Nothing in the record suggests the jurors here acted in a contrary manner. Certainly the record does not establish that the assessment of the death penalty in this case was a result of Dr. Quijano's single statement that minorities are overrepresented in the criminal justice system –

'a social phenomenon about which counsel could not assume the jury was ignorant." *Granados*, 455 F.3d at 535.

For all of these reasons, the Fifth Circuit did not err in declining to issue a COA. Therefore, this Court should deny certiorari review.

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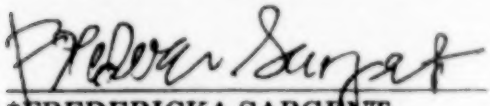

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IN THE

Supreme Court of the United States

Duane Edward Buck,
Petitioner-Appellant

v.

William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent-Appellee

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Duane Buck is an African-American man who was sentenced to death after his own attorneys knowingly presented "expert" testimony and an "expert" report – by Dr. Walter Quijano – stating that Mr. Buck was more likely to be a future danger because he is Black. Left uncorrected, trial counsel's injection of explicit racial discrimination into Mr. Buck's capital sentencing profoundly undermines confidence in the integrity of both Mr. Buck's death sentence and the criminal justice system overall.

In 2000, the Texas Attorney General acknowledged the unconstitutionality of Dr. Quijano's race-as-dangerousness testimony, declaring: "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice," and the "infusion of race as a factor for the jury to weigh in making its determination violate[s]" a capital defendant's "right to be sentenced without regard to the color of his skin." Resp. to Pet. For Cert. at 7-8, *Saldaño v. Texas*, 530 U.S. 1212 (2000). Texas therefore promised to concede constitutional error and waive its procedural defenses in six capital cases,[1] including Mr. Buck's. Texas kept its promise in every case *except Mr. Buck's*. In Mr. Buck's case, Texas has arbitrarily

[1] Press Release, Office of the Tex. Att'y Gen., *U.S. Supreme Court Grants State's Motion in Capital Case* (June 5, 2000) (Rule 60(b) Mot. Ex. 3), *Buck v. Stephens*, No. 4:04-cv-03965 (S.D. Tex. Jan. 7, 2014), ECF No. 49-1, p. 17; Press Release, Office of the Tex. Att'y Gen., *Statement from Attorney General John Cornyn Regarding Death Penalty Cases* (June 9, 2000) (Rule 60(b) Mot. Ex. 4), *Buck*, No. 4:04-cv-03965 (S.D. Tex. Jan. 7, 2014), ECF No. 49-1, p. 19.

reneged on its promise and aggressively defended the constitutionality of his racially-biased death sentence.

The singular and exceptional nature of this case warrants this Court's review. No constitutional rule is more important than the dictate that race must play no role in a criminal sentence, much less a capital sentence. Yet, the Fifth Circuit disregarded this fundamental principle, declaring that Mr. Buck's claim is "unremarkable as far as IAC claims," and denied a COA. App. B at 9. Certiorari review is required because the Fifth Circuit's decision not only "impairs the confidence of the public in the administration of justice," it also harms "the law as an institution," and "the democratic ideal reflected in the processes of our courts." *Rose v. Mitchell*, 443 U.S. 545 (1978). Furthermore, the decision below implicates two entrenched circuit splits that Texas wholly disregards in its opposition.

In his Brief in Opposition (hereinafter "BIO"), the Director opposes relief by (again) presenting of a version of Mr. Buck's case that is "obviously not accurate." *Buck v. Thaler*, 132 S. Ct. 32, 37 (2011) (Sotomayor, J., dissenting).

First, the Director's assertion that Dr. Quijano's opinion was "inherently mitigating" and did not address future dangerousness, BIO at 1, 22, is flatly refuted by the record. On direct examination, Dr. Quijano testified that there were six "statistical factors we know to predict future dangerousness," including, "Race. It's a sad commentary that minorities, Hispanic and black people, are over represented in the criminal justice system." *Id.*, Sentencing Hr'g. Tr. 110:8-14, 111:1-4, May 6, 1997, *Buck v. Stephens*, No. 4:04-cv-03965 (S.D. Tex. June, 24 2005), (ECF No. 5-

114, pp. 3-4) (emphases added). And Dr. Quijano's report identified seven statistical factors he "considered in answer to the question of [Mr. Buck's likely] future dangerousness," including: "Race. Black. Increased probability." 3/8/97 Forensic Psychological Evaluation at 7, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June, 24 2005), (ECF No. 5-118, p. 24); *Buck*, 132 S. Ct. at 33 (Opinion of Alito, J.) (quoting report). Because this opinion explicitly supported an aggravating factor – the special issue addressing future dangerousness – it was not mitigating.[2]

Second, the Director's contention that counsel made a "considered" and "strategic" decision to rely on Dr. Quijano, BIO at 20, is both speculative and nonsensical. Trial counsel has never explained the decision to retain Dr. Quijano. And no reasonable, competent attorney whose goal was to "portray Buck as nonviolent and unlikely to be a future danger," BIO at 4, would rely on an expert with an inflammatory and racially bigoted view to the contrary, especially when other experts, who did not harbor or rely on false stereotypes about race, were available.[3]

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[2] Moreover, the Director's argument is inconsistent with his closing argument at trial urging the jury to rely on Dr. Quijano's testimony to find Mr. Buck a future danger. *See Callanan Rd. Improvement Co. v. United States*, 345 U.S. 507, 513 (1953) (party estopped from "blow[ing] hot and cold" by taking position contrary to position it took in prior proceeding); 1 J. Strong, McCormick on Evidence § 55, p. 246, n. 14 (5th ed. 1999).

[3] *See, e.g., Griffith v. State*, 983 S.W.2d 282, 293 (Tex. Crim. App. 1998) (Dr. Mitchell Young, who had significant experience evaluating and treating men with a history of domestic abuse and had worked in the Institutional Division of the Texas Department of Criminal Justice, served as a defense expert in a 1995 Texas capital trial and testified that Griffith was not likely to be dangerous in the future), *cert. denied*, 528 U.S. 826 (1999); *Scheanette v. Quarterman*, 482 F.3d 815, 820-21 (5th Cir. 2007) (Dr. Gilda Kessner testified as a defense expert that, after conducting a risk assessment, she was able to determine that the defendant was not likely to be dangerous in the future); *Walbey v. Johnson*, 309 Fed. App'x 795, 804 (5th Cir. 2009)) (Dr. Curtis Edwin Willis testified as a defense expert in a 1996 Texas capital trial that the specific character traits of the defendant rendered him unlikely to be dangerous in the future).

Third, Texas misrepresents the record to claim that Dr. Quijano's testimony was not prejudicial. The testimony that Texas calls "inherently mitigating," was in fact false, "bizarre and objectionable."[4] Further, while the facts of Mr. Buck's crimes are undeniably egregious, the State's future dangerousness case was far from overwhelming: the undisputed evidence showed that Mr. Buck had performed well in prison; and the jury did not make a decision until after it sent out three notes, the last of which requested to review the expert reports (including Dr. Quijano's) again.

Mr. Buck is entitled to certiorari review and a COA.

A. Mr. Buck's Case is Extraordinary and He Is Entitled to a Certificate of Appealability.

As explained in Mr. Buck's Petition at 22, a COA is required if "reasonable jurists could either disagree with the district court's decision or 'conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 327, 336 (2003) (internal citation omitted). The panel decision denying Mr. Buck a COA did not adhere to this clearly established law Instead, in departing from that standard, it deepened two significant circuit splits, Petition at 26, 28-29; relied on an inappropriate, piecemeal merits analysis, *id.* at 24-28; ignored the overriding significance of racial discrimination, *id.* at 30-33; and, ultimately, failed to acknowledge the debatability of the district court's decision.

The Director's Opposition does not address the errors in the panel's decision, the debatability of the district court's decision, or the fact that this case implicates

[4] *Buck*, 132 S. Ct. at 33 (Alito, J.).

an issue of national importance. Instead, the Director incorrectly asserts that in order to secure a COA, Mr. Buck must "establish the denial of a valid constitutional claim," BIO at 16-17, and dedicates his Response to a series of inaccurate arguments about the merits of Mr. Buck's 60(b) motion and ineffective assistance of counsel claim. The Director's misplaced arguments neither refute nor alter the conclusion that the district court's decision is at least debatable.

1. The Panel Decision Deepens Two Circuit Court Splits.

As detailed in Mr. Buck's Petition at 26, 28-29, the panel decision contributes to two significant circuit splits relating to the proper application of the COA standard. Certiorari should be granted to resolve these splits.

First, a comparison of the outcomes of COA applications filed by capital § 2254 petitioners in the Fourth, Fifth and Eleventh Circuits over the last five years shows that a COA was denied on all claims by both the district court and the court of appeals 59% of the time in the 5th Circuit, 6.25% of the time in the Eleventh Circuit and 0% in the Fourth Circuit. *See* Petition at 26; App. F Thus, the Fifth Circuit imposes a far more burdensome standard than the Fourth or Eleventh Circuits.

Second, the Fifth Circuit's decision in Mr. Buck's case further entrenches a circuit split regarding the applicability of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), to 60(b) relief. The Fifth and Eleventh Circuits have concluded that *Martinez* is not an extraordinary circumstance, while the Third and Seventh Circuits have

concluded that *Martinez* is a factor that can be considered in a motion for 60(b) relief. *See* Petition at 28-29.

The Director asserts that Mr. Buck failed to present a "special or important reason," BIO at 9, justifying the grant of certiorari – such as "if the court of appeals entered a decision on an important question of federal law that conflicts with another court of appeals." *Id.* Because, however, Mr. Buck's petition does just this, it is clear that the Director ignored the circuit splits discussed in Mr. Buck's petition.

2. The District Court's Extraordinariness Decision is Debatable.

As detailed in Mr. Buck's Petition at 24-26, in order to reach the conclusion that Mr. Buck was not entitled to a COA, the circuit panel improperly "sidestep[ped the threshold COA] process by first deciding the merits of [Mr. Buck's] appeal, and then justifying its denial of a COA based on its adjudication of the actual merits." *Miller-El*, 537 U.S. at 336-37; *see* App. A at 2 (Dennis, J., dissenting). The panel then "'dismisse[d], miscast[], and minimize[d] [Mr. Buck's] evidence, diluting its full weight by disaggregating it and focusing the inquiry on determining whether each isolated piece of evidence, taken alone,' proves extraordinary circumstances." App. A at 4 (Dennis, J., dissenting) (citation omitted). A proper analysis of Mr. Buck's case "describe[s] a situation that is at least debatably extraordinary," *id.*, and demonstrates that Mr. Buck is entitled to a COA.

The Director's Opposition does not address the debatability of the district court's decision and, instead, disputes the extraordinariness of some of the factors

relied on by Mr. Buck to demonstrate his entitlement to 60(b) relief, BIO at 11 16; argues that "if each circumstance standing alone is not extraordinary, the combination of them cannot be extraordinary," BIO at 12; and, concludes that Mr. Buck's purported failure to demonstrate the extraordinariness of each of his proffered circumstances establishes that he is not entitled to 60(b) relief and a COA. The Director is incorrect.

a. The Proper 60(b) Analysis

Because the Director asserts that each of Mr. Buck's proffered facts and circumstances must be independently extraordinary in order to secure 60(b) relief, BIO at 12, he conducts the same kind of flawed, piecemeal analysis as the circuit panel, App. B at 8-10, and the district court, App. D at 8-10. Because, however, several of the factors discussed by Mr. Buck are individually extraordinary, when considered collectively, they are at least debatably so. Texas's contrary arguments rely on a "'dismissive and strained interpretation'" of Mr. Buck's evidence which this Court has rejected in both the COA and merits context. App. A at 5 (citing *Miller-El*, 537 U.S. at 344; *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005)).

b. The Explicit Racial Bias in Mr. Buck's Capital Sentencing

The panel's failure to acknowledge the racial discrimination in Mr. Buck's case is a fundamental error, Petition at 30-32, and the district court's decision that counsel's introduction of race-as-dangerousness evidence was "*de minimis*" and did not support a finding that Mr. Buck's case is extraordinary, App. D at 10, is plainly debatable. In capital cases, "there is a unique opportunity for racial prejudice to

operate but remain undetected." *Turner v. Murray*, 476 U.S. 28, 35 (1986). That risk is increased where, as here, future dangerousness is at issue and "a juror who believes that blacks are violence prone might well be influenced by that belief," in deciding whether to impose a death sentence. *Id.* Thus, this Court has engaged in "unceasing efforts to eradicate racial discrimination from our criminal justice system," App. D at 14 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) – especially in capital cases.

The Director contends that the racial discrimination in Mr. Buck's case cannot support a finding of extraordinariness because it "has been repeatedly and exhaustively reviewed by the lower courts." BIO at 14. The Director is wrong.[5]

First, Mr. Buck's race-based ineffectiveness claim has never received full merits review. Because the claim was defaulted, *see* Petition at 7, 10, it was not until this Court announced its decisions in *Martinez v. Ryan* (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013) – creating, for the first time, an opportunity for federal court review of defaulted claims of trial counsel ineffectiveness – that Mr. Buck had the opportunity to litigate it.

Second, the explicit racial discrimination at the heart of Mr. Buck's case has been condemned by the only courts that have directly addressed it. Justice Alito

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[5] Texas suggests that Mr. Buck was not diligent in seeking relief under Rule 60(b) because "*Trevino* was handed down on May 28, 2013" and "Buck waited until January 2014" to file his Motion. BIO at 13 n. 17. When *Trevino* was announced, however, Mr. Buck's state habeas application was pending before the Texas Court of Criminal Appeals ("CCA"). Under Texas law, the immediate post-*Trevino* filing of a Rule 60(b) motion in federal court could have precipitated the dismissal of Mr. Buck's pending application for state post-conviction relief and jeopardized his opportunity to secure substantive relief from the state court. *See Ex Parte Hernandez*, No. WR-63,282-02 (Tex. Crim. App. Nov. 25, 2009). The CCA denied relief on Mr. Buck's state habeas petition in November 2013, and Mr. Buck then promptly filed his 60(b) Motion.

described Dr. Quijano's testimony as "bizarre and objectionable," *Buck*, 132 S. Ct. at 33; Justice Sotomayor characterized Mr. Buck's case as "marred by racial overtones" that "our criminal justice system should not tolerate," *id.* at 35; and the district court below concluded that Dr. Quijano's testimony "lends credence to any potential latent prejudice held by the jury." App. D at 14. By contrast, the Fifth Circuit failed entirely to acknowledge or address the significance of the racial discrimination injected into Mr. Buck's capital sentencing proceedings. That was an extraordinary, fundamental error.

Texas's arguments do nothing to refute the fact that the express opinion of a defense "expert" witness that Mr. Buck is more deserving of a death sentence because he is Black (at least debatably) constitutes an extraordinary circumstance.

c. The Role of *Martinez* in a 60(b) Motion

The Director, BIO at 12-13 – like the panel, App. B at 7, and the district court below, App. D at 8 – contends that *Martinez* and *Trevino* categorically cannot be an extraordinary circumstance warranting Rule 60(b) relief. As detailed above and in Mr. Buck's Petition at 28-29, that is the position of the Fifth and Eleventh Circuits. The Third and Seventh Circuits, however, have held that *Martinez* is among the equitable circumstances that may support a motion for 60(b) relief. This circuit split, which Texas does not address, confirms the debatability of the district court's decision and supports Mr. Buck's entitlement to a COA.

d. The Director's Broken Promise Supports a Finding that Mr. Buck's Case is Extraordinary.

Texas's arbitrary failure to keep its promise to waive its procedural defenses and concede the unconstitutionality of Dr. Quijano's race-as-dangerousness testimony in Mr. Buck's case supports his entitlement to 60(b) relief. *See* Petition at 8-9, 15. The Director adopts and reiterates the district court's arguments that Mr. Buck has not proven he has "legally enforceable rights" or an equitable basis for requiring Texas to honor its promise, App. D. at 10, as well as the panel's conclusion that Mr. Buck has not proven the existence of a promise, App. B at 3-4, n.1. Additionally, the Director asserts that Mr. Buck has no right to a particular response from the State, and that Texas's differential treatment of Mr. Buck is justified because his is the only case where Dr. Quijano's racist opinion was presented by the defense. BIO at 14-15 (citations omitted). The Director is wrong. The district court's decision is debatable.

First, it is undisputed that in 2000 the Texas Attorney General made widely reported public announcements stating that he would concede constitutional error and waive procedural defenses in six cases, including Mr. Buck's.[6] The fact that Texas's highest elected prosecutor made such a public declaration, honored his word in every case except Mr. Buck's, and has offered no (reasonable, consistent, or reliable) explanation for his differential treatment of Mr. Buck is extraordinary, regardless of whether the Attorney General communicated a legally binding

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[6] *See, infra*, n.1. *See also* Jim Yardley, *Racial Bias Found in Six More Capital Cases*, N.Y. Times, June 11, 2000, http://www.nytimes.com/2000/06/11/us/racial-bias-found-in-six-more-capital-cases.html.

promise directly to Mr. Buck. However, any dispute about whether Texas make a specific promise to Mr. Buck (which the Director cannot and does not deny were made) is not a basis for denying Mr. Buck's 60(b) motion. It is instead the basis for an evidentiary hearing to assess the existence of the promise.

Second, the fact that Texas's broken promise does not itself afford Mr. Buck a basis for legal relief is irrelevant: extraordinary circumstances are not limited to constitutional or other federal errors. To the contrary, conduct such as "unfair surprise" can form the basis for a proper 60(b) motion even though it does "not show that petitioner's federal rights were violated during the state criminal proceedings that resulted in his conviction." *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (2d Cir. 2001). Moreover, because Texas made its promise based on its recognition that race-as-dangerousness testimony in a capital sentencing trial is so extraordinary that it requires the state to take the extraordinary step of waiving its procedural defenses, Texas's promise is powerful evidence that Mr. Buck's case is extraordinary regardless of whether Mr. Buck relied on it.

Third, the Director has offered a variety of "inaccurate" explanations, *Buck*, 132 S. Ct. at 34, for why Texas kept its promise to every prisoner except Mr. Buck. The Director now asserts that the reason for its arbitrary differential treatment of Mr. Buck is that Dr. Quijano's race-as-dangerousness testimony was elicited by the defense on direct examination, and not the prosecution. BIO at 16. But this explanation, too, is "inaccurate."

During the Texas Attorney General's 2000 search for death-sentenced prisoners whose cases involved unconstitutional testimony by Dr. Quijano, the AG's Office initially identified *eight* cases that appeared to warrant a confession of error. However, upon further review, two of the eight cases were deemed inappropriate for the promised relief. The Attorney General concluded that one of the two excluded cases – the Anthony Graves case – did not warrant a concession of error *because Dr. Quijano's race-as-dangerousness testimony was elicited by the defense on direct examination*. *See* Press Release, Office of the Tex. Att'y Gen., *Statement from Attorney General John Cornyn Regarding Death Penalty Cases* (June 9, 2000) (Rule 60(b) Mot. Ex. 4), *Buck*, No. 4:04-cv-03965 (S.D. Tex. Jan, 7, 2014), ECF No. 49-1, p. 19. Thus, the Attorney General excluded the Anthony Graves case because his lawyers presented Dr. Quijano's race-as-dangerousness opinion during direct examination (and the prosecutor urged the jury to disregard Dr. Quijano's testimony), but the Attorney General chose not to exclude Mr. Buck's case even though Mr. Buck's lawyers did the same thing (but the prosecutor reiterated and relied on Dr. Quijano's testimony). Thus, the Director still has no legitimate reason for his broken promise to Mr. Buck.

Texas's broken promise to Mr. Buck is in and of itself extraordinary, or at the very least, debatably so.

3. The District Court's Ineffective Assistance of Counsel Decision is Debatable.

The district court properly found that Mr. Buck's counsel was deficient in relying on Dr. Quijano. App. D. at 14. The Director, however, claims that the

decision below denying Mr. Buck a COA can be justified because counsel made a "strategic" and "considered" decision to introduce Dr. Quijano's testimony, which was "inherently mitigating," BIO at 20, 22. The Director's misrepresentations dramatically underscore the need for this Court's review.

First, as detailed above, there is no record evidence suggesting that counsel made a strategic, much less considered, decision to rely on Dr. Quijano.

Second, as discussed above, there was nothing mitigating about Dr. Quijano's race-as-dangerousness testimony. Indeed, Texas's assertion to the contrary is "bizarre and objectionable." *Buck*, 132 S. Ct. at 33 (opinion of Alito, J.). Furthermore, Texas's hypothetical that *some* counsel in *some* case may have a reasonable basis for presenting evidence related to race and the criminal justice is irrelevant. Because it was patently unreasonable for Mr. Buck's counsel to present evidence that his race made him more likely to be a future danger, and therefore more deserving of death,[7] the district court correctly concluded that counsel "recklessly expos[ed] his client to the risks of racial prejudice and introduced testimony that was contrary to his client's interests," App. D at 14.

The district court clearly (and at least debatably), erred by concluding that the impact of Dr. Quijano's race-as-dangerousness evidence was "*de minimis*," such that counsel's deficient performance was not prejudicial. App. D at 10, 15. Indeed,

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[7] The Fifth Circuit's decision in *Granados v. Quarterman*, 455 F.3d 529 (5th Cir. 2006), is inapposite. In *Granados*, Dr. Quijano never evaluated the defendant and only testified about the overrepresentation of minorities in the prison system. *Id.* at 534, 536 n.9. By contrast, in Mr. Buck's case, Dr. Quijano not only evaluated Mr. Buck, he also unequivocally testified, and stated in his written report, that Mr. Buck's race increased his likelihood of future dangerousness.

a majority of the Justices of this Court have already rejected the district court's "*de minimis*" theory. Specifically, Justice Alito, joined by Justices Scalia and Breyer, concluded that, if admitted by the prosecution, Dr. Quijano's testimony was sufficiently harmful to establish a constitutional violation for prosecutorial misconduct, and, by necessary implication, to warrant habeas relief under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *Buck*, 132 S. Ct. at 33. Justice Sotomayor, joined by Justice Kagan, similarly made clear that Dr. Quijano's testimony was harmful. *Buck*, 132 S. Ct. at 35 (Sotomayor, J., dissenting from the denial of certiorari).

The Director focuses almost exclusively on the aggravating facts of Mr. Buck's crimes in his attempt to demonstrate the absence of prejudice. However, if the heinous facts of a capital offense were sufficient to show that a legal error was not prejudicial, "habeas relief would virtually never be available, so testing for it would amount to a hollow judicial act.'" *Walbey v. Quaterman*, 309 F App'x 765, 804 (5th Cir. 2009) (quoting *Gardner v. Johnson*, 247 F.3d 551, 563 (5th Cir. 2001)). And, indeed, prejudice has been found in comparable or more aggravated cases than Mr. Buck's.[8]

Moreover, the Director scarcely addresses the key issue at Mr. Buck's sentencing: *viz.*, whether he was likely to commit criminal acts of violence in the

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[8] *See, e.g., Porter v. McCollum*, 558 U.S. 30 (2009) (finding *Strickland* prejudice in a case where the defendant, based on plans he made well in advance, shot and killed his ex-girlfriend and her new boyfriend in the course of a home invasion in which he also assaulted his ex-girlfriend's daughter); *Williams v. Taylor*, 529 U.S. 362, 367-69, 398-99, 418 (2000) (finding *Strickland* prejudice even though the capital murder was "just one act in a crime spree that lasted most of Williams's life," and included two violent assaults on elderly victims in the months after the capital murder, one of which left the victim in a vegetative state); *Rompilla v. Beard*, 545 U.S. 374, 378, 391-93 (2005) (finding *Strickland* prejudice even though the petitioner deliberately tortured the victim and had a significant history of convictions involving the use or threat of violence, including raping and slashing a woman during a burglary).

future, which the jury had to find before sentencing him to death. On this dispositive point, the prosecution's case was tenuous at best: the undisputed evidence was that Mr. Buck performed well in prison, as predicted by the other defense expert, Dr. Lawrence. The jury did not find the sentencing decision to be easy and, indeed, did not announce its decision on the special issues until after the foreman sent three notes to the judge during deliberations, the last of which requested the psychology and police reports, including the very report in which Dr. Quijano unequivocally stated: "Race. Black. Increased probability." *See* 3/8/97 Forensic Psychological Evaluation at 7, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June, 24 2005), (ECF No. 5-118, p. 24)

The trial court's instruction to the jury "'not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice public opinion, or public feeling *in considering all of the evidence before [them]* and in answering,' the future dangerousness special issue" BIO at 22 (emphasis added), did nothing to prevent the jury from considering – or giving great weight to – Dr. Quijano's race-as-dangerousness opinion because that opinion was among the evidence that the jury was required to consider.

CONCLUSION

For the reasons stated above and in Mr. Buck's Petition for Certiorari, this Court should grant certiorari and a Certificate of Appealability.

Respectfully submitted,

/s/ Christina A Swarns

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No. 15-8049

IN THE

Supreme Court of the United States

DUANE EDWARD BUCK,

Petitioner-Appellant,

v

WILLIAM STEPHENS, DIRECTOR, DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that all parties required to be served, have been served, on this 4th day of April, 2016, in accordance with U.S. Supreme Court Rule 29.3, one (1) copy of the foregoing **REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI** by placing said copy in the U.S. mail, first class postage prepaid, addressed as listed below. I further certify that in accordance with Supreme Court of the United States Rule 29.3, an electronic version of the foregoing was also served.

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My Commission Expires June 14, 2020.

RECORD AND BRIEFS

[illegible]

No. 15-8049

In The Supreme Court of the United States

DUANE EDWARD BUCK, *Petitioner*,

v.

WILLIAM STEPHENS,
DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE HONORABLE MARK L. EARLEY, THE HONORABLE TIMOTHY K. LEWIS, THE HONORABLE GREGORY B. CRAIG, AND THE HONORABLE SHEILA JACKSON LEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are individuals who have a deep interest in the fairness of our criminal justice system.

Mark L. Earley is the former Republican Attorney General of the Commonwealth of Virginia. For ten years, Mr. Earley served as President and CEO of the world's largest outreach to prisoners and families—Prison Fellowship. He is now the Head of Earley Legal Group, a Virginia-based legal practice group.

Timothy K. Lewis is a former Circuit Judge on the U.S. Court of Appeals for the Third Circuit. Judge Lewis was elevated to the Third Circuit in 1992 by President George H.W Bush. Prior to his elevation, Judge Lewis served as a Judge on the U.S. District Court for the Western District of Pennsylvania and as an Assistant United States Attorney for the Western District of Pennsylvania. He is now Counsel at Schnader, Harrison, Segal & Lewis LLP in Pittsburgh, Pennsylvania.

Gregory B. Craig was Counsel to the President in 2009 and 2010. He is of counsel at Skadden, Arps, Slate, Meagher & Flom LLP

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, counsel notes that the law firm of counsel for amici has assisted counsel for Petitioner at earlier stages of this case and has contributed financially to the preparation and submission of this brief. No person other than amici or counsel for amici made a monetary contribution to the preparation or submission of this brief.

Sheila Jackson Lee is a Democrat representing Texas's 18th Congressional District in the United States House of Representatives. Congresswoman Jackson Lee is a senior Member of the House Judiciary Committee, and is now the Ranking Member on the Subcommittee on Crime, Terrorism, Homeland Security and Investigations. Congresswoman Jackson Lee is currently serving her eleventh term as a member of the United States House of Representatives.

INTRODUCTION AND SUMMARY OF ARGUMENT

The explicit use of race in determining the appropriateness of the death penalty – or any criminal sentence – poisons our system of justice. This case is about exactly such a toxic occasion. In the penalty phase of a Texas capital trial, an expert testified that the petitioner's race was evidence of future dangerousness.

This Court has repeatedly declared that race is an arbitrary and pernicious factor which cannot play a role in our system of justice. Accordingly, this Court has consistently and emphatically acted to root out the impermissible use of race in criminal trials. Given this clear and unequivocal precedent, this Court cannot condone a death sentence which was imposed after the defendant's race was presented as an aggravating factor.

Our system of justice depends on the faith and confidence of the citizens. The use of race to support the case for a defendant's death – or any criminal penalty – raises profound and troubling concerns

that go to the integrity of our system of justice. For the reasons detailed in the Petition, this Court must act to ensure that Mr. Buck's punishment does not rest on a proceeding tainted by race.

Amici have different perspectives on the death penalty, and amici express no opinion here on its permissibility or propriety. Amici nevertheless deeply share the conviction that no sentence – especially a death sentence – may be based on a record that includes an explicit invocation of race as a justification for the sentence, and that an essential role of this Court is to ensure that such a miscarriage of justice does not go uncorrected.

ARGUMENT

Duane Edward Buck, an African-American man, was sentenced to death by a Texas jury in 1997. At the penalty phase of his capital punishment trial, the jury was tasked with determining whether Mr. Buck was likely to be dangerous in the future. A jury finding of future dangerousness was a prerequisite for a death sentence. On this crucial threshold question, the jury was told on at least four occasions that Mr. Buck's race rendered him more likely to be dangerous in the future. *First*, Mr. Buck's counsel placed an expert report by Dr. Walter Quijano into evidence. The report stated that Mr. Buck's race—black—made him more likely to be dangerous in the future. *Second*, Mr. Buck's counsel elicited testimony from Dr. Quijano that highlighted the purported connection between Mr. Buck's race and his likelihood to be dangerous in the future. *Third*, the prosecutor elicited the same race-based testimony from Dr. Quijano – again accentuating the supposed

connection between Mr. Buck's race and his future dangerousness. *Fourth*, in his closing argument, the prosecutor, without specifically mentioning race, encouraged the jury to rely on Dr. Quijano's testimony in finding future dangerousness. Pet. at 4-6.

Although Mr. Buck's race had no proper lawful role in the capital sentencing process, these four occurrences, both separately and cumulatively, ensured that the jury considered race in making its future dangerousness decision. This noxious and deeply prejudicial use of race flouts this Court's consistent holdings that race has no place in our criminal justice system and undermines public confidence in our justice system's ability to treat each defendant fairly.

I. THIS COURT HAS CONSISTENTLY DECLARED THAT RACE IS AN ARBITRARY AND HARMFUL FACTOR WHICH HAS NO PLACE IN THE CRIMINAL JUSTICE SYSTEM.

For over a century, this Court has condemned the consideration of race in the criminal justice process. *See, e.g.*, *Ex Parte Virginia*, 100 U.S. 339, 345 (1880) (prohibiting the race-based exclusion of grand and petit jurors and emphasizing that the Thirteenth and Fourteenth Amendments "were intended to take away all possibility of oppression by law because of race or color."); *Strauder v. West Virginia*, 100 U.S. 303, 309-10 (1880) ("[H]ow can it be maintained that compelling a colored man to submit to a trial for his life drawn from a panel from which the State has expressly excluded every man of

his race, because of color alone is not a denial to him of equal legal protection?"); *Martin v. Texas*, 200 U.S. 316, 319 (1906) ("[I]t is the settled doctrine of this court that whenever, by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the 14th Amendment of the Constitution of the United States[.]"); *Cassell v. Texas*, 339 U.S. 282, 287 (1950) ("An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race."); *Oyler v. Boles*, 368 U.S. 448, 456 (1962) ("Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon a*n unjustifiable standard such as race, religion, or other arbitrary classification*." (emphasis added)); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon *an unjustifiable standard such as race, religion, or other arbitrary classification*." (emphasis added; internal quotation marks and alterations omitted)); *Wayte v. United States*, 470 U.S. 598, 608 (1985) ("[T]he decision to prosecute may not be deliberately based upon an unjustifiable standard such as race[.]" (internal quotation marks and alterations omitted)); *Batson v. Kentucky*, 476 U.S.

79, 85 (1986) ("More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded."); *Powers v. Ohio*, 499 U.S. 400, 411 (1991) ("The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors. The intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee." (internal citations omitted)).

Indeed, this Court recognized that "[d]iscrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to black citizens that equal justice which the law aims to secure to all others,'" *Batson*, 476 U.S. at 87-88 (1986) (quoting *Strauder v. West Virginia*, 100 U.S. at 308) (alterations omitted). The perniciousness of race is such that it damages our system of criminal justice when it plays any role:

> For we also cannot deny that, [151] years after the close of the War Between the States and [over] 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.

Rose v. Mitchell, 443 U.S. 545, 558-59 (1979). Not only has this Court consistently emphasized that

there is no place for race in criminal trials, Congress likewise has legislated that there is no place for race in federal sentencing. *See* 28 U.S.C. § 994(d) ("The [United States Sentencing] Commission shall assure that the [sentencing] guidelines and policy statements are entirely neutral as to the race of offenders.").

It is for these very reasons that the Texas Attorney General, when confronted with this expert's race-as-dangerousness testimony in another case, acknowledged that "it is inappropriate to allow race to be considered as a factor in our criminal justice system." Press Release, Office of the Texas Attorney General (June 9, 2000).

As detailed above, in Mr. Buck's case, Dr. Walter Quijano testified, consistent with his expert report, that Mr. Buck's race made him more likely to be dangerous in the future. The fact that Dr. Quijano was a defense witness severely exacerbates the prejudice caused by his testimony. And the prosecution made this already bad situation worse by reiterating the putative connection between race and dangerousness, and urging the jury to rely on that testimony in closing argument.

There is no benign interpretation for this use of race. And because we cannot measure the impact of this plainly false, prejudicial and unconstitutional testimony on the jury, this Court cannot conclude, much less assure the public, that Mr. Buck's death sentence was not based on his race.

II. THE USE OF RACE TO JUSTIFY A DEATH SENTENCE THREATENS PUBLIC CONFIDENCE IN OUR JUSTICE SYSTEM.

"Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). Our justice system depends on American citizens' faith in its fairness for its effective operation. Indeed, one of the animating rationales for this Court's decision in *Batson* was the concern that "[s]election procedures that purposefully exclude black persons from juries undermine our public confidence in the fairness of our system of justice." 476 U.S. at 87 As this Court has explained:

> Batson is based in large part on the right to be tried by a jury whose members are selected by nondiscriminatory criteria *and on the need to preserve public confidence in the jury system*. These are not values shared only by those of a particular color; they are important to all criminal defendants.

Holland v. Illinois, 493 U.S. 474, 489 (1990) (emphasis added). For this reason, this Court has held that criminal defendants are "entitled to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of

justice." *Alexander v. Louisiana*, 405 U.S. 625, 628 (1972).

Public confidence in the justice system is undermined not only by racial bias in juror selection, but also by perceptions of racial bias in the criminal justice system writ large. "The claim that the court has discriminated on the basis of race in a given case brings the integrity of the judicial system into direct question." *Rose*, 443 U.S. at 563.

It is increasingly well established that public confidence in the judiciary is weakened by the perception that minorities, particularly African Americans, are treated differently – worse – in our justice system. An August 2013 Pew Research Center survey found that 68 percent of black people believe that blacks are treated less fairly than whites in the courts, and that more than a quarter of whites (27%) hold the same belief. Eileen Patten, *Pew Research Center, The Black-White and Urban-Racial Dividends in Perceptions of Racial Fairness* (Aug. 28, 2013). A Gallup poll similarly found that 68 percent of non-Hispanic blacks perceive that the American justice system is biased against black people, and that a quarter (25%) of non-Hispanic whites hold the same view. Frank Newport, *Gallup:, Gulf Grows in Black-White Views of U.S. Justice System Bias* (July 22, 2013).

Mr. Buck's case reinforces this perception of unequal justice and threatens to validate concerns about racial bias in the court system. *See, e.g.*, American Bar Association Death Penalty Representation Project, *Texas Court Refuses to Correct Taint of Race-Based Testimony in Duane*

Buck Case, 8 PROJECT PRESS 1, (Spr. 2014); Eric Guster, *Man on Death Row because in Texas, Being Black Means You're Dangerous*, THE GRIO, (Oct. 19, 2014), http://thegrio.com/2014/10/19/black-means-dangerous/; Charles J. Ogletree Jr., *Condemned to Die Because He's Black*, N.Y. TIMES, Aug. 1, 2013, at A21; Nathan Koppel, *Did Race Play an Improper Role in Duane Buck's Death Sentence*, WALL STREET J.: LAW BLOG, (Sept. 8, 2011), http://blogs.wsj.com/law/2011/09/08/did-race-play-an-improper-role-in-duane-bucks-death-sentence/.

The proper administration of justice relies on the public confidence of all Americans, regardless of race. If Mr. Buck is executed without full and fair review of his claim that his lawyer was ineffective for injecting racial bias into the sentencing proceedings, his case can and will further undermine public confidence in our justice system's ability to treat all defendants fairly. This Court should not permit this unnecessary, harmful, and unacceptable damage to our criminal justice system.

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to grant petitioner's request for a writ of certiorari.

Respectfully submitted,

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March 7, 2016

No. 15-8049

IN THE

Supreme Court of the United States

DUANE EDWARD BUCK,

Petitioner,

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 4, 2016
CERTIORARI GRANTED JUNE 6, 2016

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RELEVANT DOCKET ENTRIES

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT [NO. 14-70030]

Date Filed	Docket Text
09/29/2014	DEATH PENALTY CASE docketed. NOA filed by Appellant Mr. Duane Edward Buck [14-70030] (MRW)
	* * *
05/11/2015	CORRECTED MOTION for certificate of appealability [7910348-2]. Motion due deadline satisfied.. Response/Opposition due on 06/10/2015. [14-70030]
	REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: MOTION filed by Appellant Mr. Duane Edward Buck for certificate of appealability [7910348-2]. Date of service: 05/11/2015 via email - Attorney for Appellants: Black, Spital, Swarns; Attorney for Appellee: Sargent [14-70030] (Christina A. Swarns)
05/11/2015	BRIEF IN SUPPORT filed by Appellant Mr. Duane Edward Buck in support of motion for certificate of appealability [7910348-2] (INCORPORATED IN

MOTION FOR COA) Brief in Support deadline satisfied. [7910507-1] [14-70030] (MFY)

* * *

06/10/2015 RESPONSE/OPPOSITION [7933991-1] to the motion for certificate of appealability filed by Appellant Mr. Duane Edward Buck in 14-70030 [7910348-2]Response/Opposition deadline satisfied. [14-70030]

REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: RESPONSE/ OPPOSITION filed by Mr. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division [7933991-1] to the motion for certificate of appealability filed by Appellant Mr. Duane Edward Buck in 14-70030 [7910348-2] Date of Service: 06/10/2015 via email - Attorney for Appellants: Black, Spital, Swarns; Attorney for Appellee: Sargent. [14-70030] (Fredericka Searle Sargent)

06/24/2015 DOCUMENT RECEIVED - NO ACTION TAKEN No action will be taken at this time on the reply to response/opposition to motion for

	certificate of appealability received from Appellant Mr. Duane Edward Buck because leave of the court is required [14-70030] (MRW)
06/25/2015	UNOPPOSED MOTION filed by Appellant Mr. Duane Edward Buck for leave to file a reply [7946888-2] to the response/opposition filed by Appellee Mr. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division in 14-70030 [7933991-2], motion for certificate of appealability filed by Appellant Mr. Duane Edward Buck in 14-70030 [7910348-2]. Date of service: 06/25/2015 via email Attorney for Appellants: Black, Spital, Swarns; Attorney for Appellee: Sargent [14-70030] (Christina A. Swarns)
06/26/2015	COURT ORDER granting motion for leave to file a reply filed by Appellant Mr. Duane Edward Buck [7946888-2] [14-70030] (MRW)
06/26/2015	REPLY filed by Appellant Mr. Duane Edward Buck [7947570-1] to the response/opposition filed by Appellee Mr. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division in

	14-70030 [7933991-2], to the motion for certificate of appealability filed by Appellant Mr. Duane Edward Buck in 14-70030 [7910348-2]. [14-70030] (MRW)
08/20/2015	UNPUBLISHED OPINION ORDER FILED. [14-70030 Affirmed] Judge: JES , Judge: PRO , Judge: CH; denying motion for certificate of appealability filed by Appellant Mr. Duane Edward Buck (ISSUED AS AND FOR THE MANDATE) [7910348-2] [14-70030] (JRS)
08/20/2015	MANDATE ISSUED. [14-70030] (JRS)
	* * *
09/11/2015	PETITION filed by Appellant Mr. Duane Edward Buck for rehearing en banc [8009756-2]. Date of Service: 09/11/2015 via email - Attorney for Appellants: Black, Spital, Swarns; Attorney for Appellee: Sargent [14-70030] (Christina A. Swarns)
	* * *
10/09/2015	RESPONSE/OPPOSITION [8031002-1] to the petition for rehearing en banc

filed by Appellant Mr. Duane Edward Buck in 14-70030 [8009756-2], court order Court directive requesting a response [8021783-2]Response/ Opposition deadline satisfied. [14-70030]

REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: RESPONSE/ OPPOSITION filed by Mr. William Stephens, Director, Texas Department of Criminal Justice, Correctional Institutions Division [8031002-1] to the petition for rehearing en banc filed by Appellant Mr. Duane Edward Buck in 14-70030 [8009756-2] Date of Service: 10/09/2015 via email - Attorney for Appellants: Black, Spital, Swarns; Attorney for Appellee: Sargent. [14-70030] (Fredericka Searle Sargent)

11/06/2015 COURT ORDER denying petition for rehearing en banc filed by Appellant Mr. Duane Edward Buck [8009756-2] With Poll.; Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is denied [8053446-1] JLD, Circuit Judge, with whom JEG, joins, dissenting [14-70030] (JMA)

* * * *

RELEVANT DOCKET ENTRIES FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
[NO. 4:04-CV-03965]

Date Filed	#	Docket Text
10/14/2004	1	PETITION for Writ of Habeas Corpus (Filing fee $ 0.) filed by Duane Edward Buck.(mholland,) Additional attachment(s) added on 10/14/2004 (mholland,). (Main Document 1 replaced on 3/27/2015) (rwestmoreland, 4). (Entered: 10/14/2004)
		* * *
09/06/2005	6	ANSWER to Petition for Writ of Habeas Corpus by Douglas Dretke, filed.(Stewart-Klein, Ellen) (Entered: 09/06/2005)
09/06/2005	7	MOTION for Summary Judgment by Douglas Dretke, filed. Motion Docket Date 9/26/2005. This entry is attached to the same document as 6 and was made for case management purposes. (ltien,) (Entered: 09/09/2005)
		* * *

01/06/2006	11	RESPONSE to 7 MOTION for Summary Judgment, filed by Duane Edward Buck. (dhansen) (Entered: 01/09/2006)
01/26/2006	12	REPLY to Response to 7 Motion for Summary Judgment, filed by Douglas Dretke. (Stewart-Klein, Ellen) Modified on 2/8/2006 - linked to #7 (ltien,). (Entered: 01/26/2006)

* * *

07/24/2006	15	MEMORANDUM AND ORDER granting 7 MOTION for Summary Judgment. Petitioner's Petition for Writ of Habeas Corpus is denied. No Certificate of Appealability shall issue. (Signed by Judge Vanessa D Gilmore) Parties notified.(kmurphy,) (Entered: 07/26/2006)
07/24/2006	16	FINAL JUDGMENT. Case terminated on 07/24/06.(Signed by Judge Vanessa D Gilmore) Parties notified.(kmurphy,) (Entered: 07/26/2006)
08/03/2006	17	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: 16 Final Judgment by Duane Edward Buck (Filing fee $ 455), filed. (jbradford,) (Entered: 08/03/2006)

* * *

10/01/2009	25	Per Curiam of USCA for the Fifth Circuit (certified copy) dated 9/25/2009 re: 17 Notice of Appeal ; USCA No. 06-70035. Petition for a Certificate of Appealability Denied, filed.(hler,) (Entered: 10/02/2009)
04/30/2010	26	The petition for a writ of certiorari filed with the Supreme Court has been denied (USCA No. 06-70035) (USSC No. 09-8589), filed. (chorace) (Entered: 05/05/2010)
09/07/2011	27	MOTION for Relief from Judgment by Duane Edward Buck, filed. Motion Docket Date 9/28/2011. (Attachments: # 1 Exhibit 01, # 2 Exhibit 02, # 3 Exhibit 03, # 4 Exhibit 04, # 5 Exhibit 05, # 6 Exhibit 06, # 7 Exhibit 07, # 8 Exhibit 08, # 9 Exhibit 09, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Proposed Order)(Dow, David) (Entered: 09/07/2011)
09/07/2011	28	MOTION to Stay *Execution* by Duane Edward Buck, filed. Motion Docket Date 9/28/2011. (Attachments: # 1 Exhibit 01, # 2 Exhibit 02, # 3 Proposed Order) (Dow, David) (Entered: 09/07/2011)

* * *

09/09/2011	30	RESPONSE in Opposition to 27 MOTION for Relief from Judgment, 28 MOTION to Stay *Execution*, filed by Douglas Dretke. (Attachments: # 1 Proposed Order)(Oden, Georgette) (Entered: 09/09/2011)
09/09/2011	31	ORDER denying 27 Motion for Relief from Judgment; denying 28 Motion to Stay. (Signed by Judge Vanessa D Gilmore) Parties notified.(emares,) (Entered: 09/09/2011)

* * *

09/12/2011	33	MOTION to Alter Judgment by Duane Edward Buck, filed. Motion Docket Date 10/3/2011. (Attachments: # 1 Exhibit 01, # 2 Exhibit 02, # 3 Exhibit 03, # 4 Exhibit 04, # 5 Proposed Order)(Black, Katherine) (Entered: 09/12/2011)

* * *

09/12/2011	36	ORDER denying 33 Motion to Alter Judgment; denying 34 Motion for Sanctions; no certificate of appealability shall be issue.(Signed by Judge Vanessa D Gilmore) Parties notified.(emares,) (Entered: 09/12/2011)

09/13/2011	37	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: 31 Order on Motion for Relief from Judgment, Order on Motion to Stay by Duane Edward Buck, filed.(Black, Katherine) (Entered: 09/13/2011)

* * *

09/20/2011	42	Per Curiam of USCA re: 37 Notice of Appeal ; USCA No. 11-70025; Buck's application for COA as to his contention that reasonable jurists could debate the district court's disposition of his motion to reconsider judgment is denied. We deny the request for stay of execution, filed. (jhancock) (Entered: 09/21/2011)
11/14/2011	43	The petition for a writ of certiorari filed with the Supreme Court has been denied (USCA No. 11-70025) (USSC No. 11-6391), filed. (Attachments: # 1 Letter)(mmapps,) (Entered: 11/14/2011)

* * *

01/07/2014	49	MOTION for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6) by Duane Edward Buck, filed. Motion Docket Date 1/28/2014. (Attachments: # 1 Exhibits, # 2 Proposed Order)(bthomas, 4) (Entered: 01/09/2014)

* * *

04/10/2014	58	RESPONSE to 49 MOTION for Relief from Judgment filed by Rick Thaler. (Sargent, Fredericka) (Entered: 04/10/2014)
04/10/2014	59	Amended RESPONSE to 49 MOTION for Relief from Judgment filed by Rick Thaler. (Sargent, Fredericka) (Entered: 04/10/2014)

* * *

05/21/2014	64	REPLY to Response to 49 MOTION for Relief from Judgment, filed by Duane Edward Buck. (Swarns, Christina) (Entered: 05/21/2014)

* * *

08/29/2014	66	ORDER denying 49 Motion for Relief from Judgment. It is further ordered that no certificate of appealability shall issue. (Signed by Judge Vanessa D Gilmore) Parties notified.(bthomas, 4) (Entered: 08/29/2014)
09/26/2014	67	MOTION to Alter Judgment by Duane Edward Buck, filed. Motion Docket Date 10/17/2014. (Attachments: # 1 Proposed Order)(Swarns, Christina) (Entered: 09/26/2014)

* * *

09/26/2014	69	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: 66 Order on Motion for Relief from Judgment by Duane Edward Buck, filed.(Swarns, Christina) (Entered: 09/26/2014)

* * *

10/15/2014	71	RESPONSE in Opposition to 67 MOTION to Alter Judgment, 68 MOTION for Oral Argument on Mr. Buck's Motion to Alter or Amend this Court's Memorandum and Order Denying Duane Buck's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6). Hearing re: 67 MOTION to, filed by William Stephens. (Sargent, Fredericka) (Entered: 10/15/2014)

* * *

10/20/2014	73	REPLY to 71 Response in Opposition to Motion, *PETITIONER'S REPLY TO RESPONDENT STEPHENS'S RESPONSE TO BUCK'S MOTION TO ALTER OR AMEND THIS COURT'S MEMORANDUM AND ORDER DENYING HIS MOTION*

FOR RELIEF FROM JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 60(b)(6) AND MOTION FOR ORAL ARGUMENT, filed by Duane Edward Buck. (Swarns, Christina) (Entered: 10/20/2014)

* * *

03/11/2015 75 ORDER denying 67 Motion to Alter Judgment. No certificate of appealability shall issue. (Signed by Judge Vanessa D Gilmore) Parties notified.(amwilliams, 4) (Entered: 03/11/2015)

* * *

04/08/2015 78 Amended NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: 75 Order on Motion to Alter Judgment, 66 Order on Motion for Relief from Judgment by Duane Edward Buck, filed. (Black, Katherine) Modified on 4/9/2015 (bcampos, 1). (Entered: 04/08/2015)

* * * *

DEFENSE EXHIBIT 1 (DR. QUIJANO REPORT REDACTED), MARCH 8, 1997

DEFENSE EXHIBIT NO. 1
FORENSIC PSYCHOLOGICAL EVALUATION
[EXHIBIT MARKER OMITTED]

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FORENSIC PSYCHOLOGICAL EVALUATION

NAME: Duane E. Buck DATE: 8 March 1997

INTRODUCTION:

Duane, a 33-year-old widowed Black male with a high school education and auto mechanics work background, was referred for a forensic psychological evaluation by his counsel, Danny Easterling, Esq. to assist in his defense. The defendant was charged with capital murder (Cause No. 699684 in the 208th Judicial District of Harris County, Texas).

He was advised that this report was to be submitted to his counsel and that he had the right not to participate

in the examination and to terminate the examination at any point he wanted to. He knew of and anticipated the examination.

The information used in this report was gathered for the avowed purpose of assisting in his own defense and should not be used as the basis for determining guilt or innocence.

PROCEDURES:

1. Clinical interview with defendant on 2/14/97
2. Millon Clinical Multiaxial Inventory-II (MCMI-II)
3. Review of defense lawyer's notes on witnesses' statements.

FINDINGS:

Behavioral Observations/Mental Status. The defendant was examined at the Harris County Jail. He was appropriately dressed and groomed. Gait was normal. No unusual gestures were observed. Voice was appropriate for the situation. The defendant was friendly and cooperative.

he was generally oriented to time,
Speech was reactive and expressive and contained no association, delusion, or hallucination disorders. Memory was intact by interview and fair by self-report. No memory problems were reported. Abstract thinking was normal by interview in that he was able to conduct a meaningful conversation. Attention and concentration were normal,

The defendant's mood and affect were normal.

Vegetative signs were reviewed. He sleeps in peace because of the love of Jesus. His appetite is fair; he fasts for his spiritual growth. Energy level is normal.

History. The defendant attended school through the 12th grade, and completed a trade school curriculum in paint and body automobile repair. He also studied auto mechanics in TDCJ-ID. He has worked with his father in auto mechanics and used parts "all my life."

The defendant has had two common law marriages. The first marriage from 1984 till 1989 produced a son, now nine.

He and former wife continue to be friends. His second marriage from 1991 till 1995 was with the now deceased complainant. They had no children.

MCMI-II. The Personality code was: 8B 312 ** - * 8A + 7 4 6A ' // S ** - * //. The Syndrome code was: B D ** A * // - ** CC *. The test was valid, though he appeared to have magnified the level of experienced illness. Suggested Axis I impressions were:

296.33 Major depression, recurrent, severe without psychotic features
305.00 Alcohol abuse
300.02 Generalized anxiety disorder.

Suggested Axis II impression was a configuration of:

301.22 Schizotypal personality disorder

301.90 Personality disorder NOS (Self-defeating)
301.60 Dependent personality disorder.

CLINICAL IMPRESSION:

Axis I - 303.90 Alcohol dependence, in remission by incarceration
304.20 Cocaine dependence, in full remission by report
Axis II - 301.60 Dependent personality features

Axis III - None reported

Axis IV - Psychosocial stressors: incarceration, pending capital murder charge

Axis V Global Assessment of Functioning: 60 GAF before jail: 50

CLINICAL RECOMMENDATIONS:

1. Substance abuse treatment program:

A. If released to community:

1) Relapse prevention groups: 48 weekly sessions and then aftercare.
2) Supervised antagonist therapies: Antabuse for alcohol and Naltroxene for cocaine.
3) Random urinalysis at least twice a month.

B. If incarcerated, participate in an in-house substance abuse program.

2. Individual therapy to identify Dependent personality disorder features that may have contributed to the conduct charged and modify them.

FORENSIC RECOMMENDATIONS:

1. Encourage the defendant to recall the remainder of what he did upon his second return to the house, when he was accused of fatally shooting his girlfriend and a male companion, and shooting his sister. The claim of sudden onset of amnesia just prior to the shootings, after a detailed recollection of the rest of the events, is not credible and not psychological supportable.

2. Future Dangerousness, Whether there is probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society? The following factors were considered in answer to the question of future dangerousness: statistical, environmental, and clinical judgment.

I. STATISTICAL FACTORS

1. **Past crimes.** Non-contributory. His past offenses were non-violent drug offenses.

2. **Age.** Decreased probability. He is now 33; street crimes are of lesser probability with this age group and older.

3. **Sex.** Increased probability. Males are more violent than females as a group.

4. **Race.** Black: Increased probability. There is an over-representation of Blacks among the violent offenders.

5. **Socioeconomics.** Stable by self-report: Decreased probability. Unstable by a witness' report: increased probability.

6. **Employment stability.** Stable by self-report: Decreased probability. Unstable by a witness' report: increased probability.

7. **Substance abuse.** Yes for alcohol at the time of the conduct charged, and cocaine by history: Increased probability.

II. ENVIRONMENTAL FACTORS

1. **Family environment.** No exposure to family abuse/violence: Decreased probability.

2. **Peer environment.** Did not Associate with peers that encouraged assaultive crimes: Decreased probability.

3. **Job Environment.** Past jobs were not conducive to violence: Decreased probability.

4. **Availability of victims.** Narrow victim pool: Decreased probability. This appears to be "family" type violence with a conjugal jealousy precipitated by a perception of wife's infidelity; the victims were not randomly picked. Non-random victimizers are less dangerous than random victimizers.

5. **Availability of weapons.** Yes: Increased probability.

6. **Availability of drugs.** Yes: Increased probability.

III. CLINICAL JUDGMENT FACTORS

1. **Mental illness.** There is no history of thinking disorder that is associated with assaultiveness. This factor is considered to reduce dangerousness.

2. **Anti-social personality disorder.** The defendant does not meet the criteria of anti-social personality disorder, though he has antisocial features. This factor argues for less probability for continuing violent threat to society.

3. **Specificity of the situation that induced the conducts** charged. **This appears to be a family type violence, influenced by** conjugal jealousy precipitated by his perception of wife's infidelity. This factor argues for less probability for continuing violent threat to society.

4. **Deliberateness.** Insufficient data from self-report. He does not remember shooting the victims, though he admitted to police he did the shootings at the time of his arrest. He appeared to be deliberate from witnesses' statements showing he returned a second time with a gun, forced himself into the house, and ignored pleadings not to shoot: Increased probability.

5. **Remorse**. He does not remember shooting the victim, though he admitted to the police he did the shootings at the time of his arrest: Increased probability.

6. **Post-conducts charged behaviors.**

a. Continuing crimes. None of the versions showed continuing crimes after the conduct charged since he was promptly arrested. This factor is not applicable as he did not have the opportunity to commit more crimes.

b. Fun:

This factor argues for more probability for continuing violent threat to society.

c. Surrender. He peacefully cooperated with his arrest, though the police had a gun pointed at him at the time of arrest. This factor argues for less probability for continuing violent threat to society.

7. **Personal factors that contributed to the conducts** charged. **There were personal factors reportedly operating at the** time of the conduct charged that may have made the conduct charged specific and limited to this offense circumstance, such that repetition of the offense in the future is unlikely. The apparent motivation was conjugal jealousy precipitated by his perception of his wife's infidelity. This factor argues for less probability for continuing violent threat to society.

9. **Environmental factors that contributed to the conducts** charged. **There were environmental factors reportedly operating at** the time of the conducts charged that may have made the conducts specific and limited to this offense circumstance, such that repetition of the

offense in the future is unlikely, i.e., The presence of individuals that he perceived as participants in the wife's infidelity. He did not hurt the children. This factor argues for less probability for continuing violent threat to society.

10. **Effect of prolonged incarceration.** The defendant is of course less likely to be dangerous while incarcerated. The effect of prolonged incarceration (e.g., aging) in conjunction with physical restraints (e.g., security level and housing), rehabilitative efforts (e.g., education, substance abuse, punishment, psychiatric services) needs to be estimated. The prison system has enough resources to subdue what level of dangerousness he may bring with him: classification/security level system, housing restraints (administrative segregation and super segregation), supervision, crisis intervention (major use of force techniques), and psychiatric medication intervention.

His behavior record in jail and in previous prison stays may be used as a sign that he may do well in prison. He reported no assaults while in incarceration; he worked and attended school. Furthermore, lifers in the prison system tend to do well and better than short termers. The conditions, e.g., more space, less in-cell time, more out-of-cell activities, in prison is less conducive to acting out.

Overall, it appears that, without intervention, the defendant is more likely than not to constitute a continuing violent threat to society. However, if given life instead of death, the prison system has enough resources to safely incarcerate him. Additionally, the factors that can be manipulated and presently contribute to dangerousness can be controlled in prison.

Employment and financial instability is no longer a factor in prison. It is more difficult to gain access to drugs and alcohol and weapons in prison. His victim pool, already narrow in the instant offense because of its family violence features, becomes narrower in prison; furthermore, the prospective victims in prison are less naive in that they are aware of their environment and take the necessary precautions to minimize victimization. The dependent husband/wife relationship, that contributed to the conduct charged, is gone.

Thank you for consulting me on this difficult but interesting case. Please feel free to contact me if you have any questions.

/s/ Walter Y. Quijano
Walter Y. Quijano, Ph.D., P.C.
Clinical Psychologist.

DEFENSE EXHIBIT 1A (DR. QUIJANO REPORT UNREDACTED), MARCH 8, 1997

DEFENDANT'S EXHIBIT NO. 1(A)

FORENSIC PSYCHOLOGICAL EXAMINATION

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FORENSIC PSYCHOLOGICAL EVALUATION

NAME: Duane E. Buck DATE: 8 March 1997

INTRODUCTION:

Duane, a 33-year-old widowed Black male with a high school education and auto mechanics work background, was referred for a forensic psychological evaluation by his counsel, Danny Easterling, Esq. to assist in his defense. The defendant was charged with capital murder (Cause No. 699684 in the 208th Judicial District of Harris County, Texas). The defense lawyer wrote in his 1/13/97 letter to this psychologist that the defendant is "alleged to have shot and killed his ex-girlfriend and a male companion as well as shooting his half sister in the same criminal transaction ..."

He was advised that this report was to be submitted to his counsel and that he had the right not to participate in the examination and to terminate the examination at any point he wanted to. He knew of and anticipated the examination.

The information used in this report was gathered for the avowed purpose of assisting in his own defense and should not be used as the basis for determining guilt or innocence.

PROCEDURES:

1. Clinical interview with defendant on 2/14/97
2. Millon Clinical Multiaxial Inventory-II (MCMI-II)
3. Review of defense lawyer's notes on witnesses' statements.

FINDINGS:

Behavioral Observations/Mental Status. The defendant was examined at the Harris County Jail. He was appropriately dressed and groomed. Gait was normal. No unusual gestures were observed. Voice was appropriate for the situation. The defendant was friendly and cooperative.

The defendant was oriented to person, place, and situation. He initially said he did not know the date because he has been in jail since July 1995, but when pressed he was generally oriented to time, thinking it was Friday 2/13/97 instead of 2/14/97. Speech was reactive and expressive and contained no association, delusion, or hallucination disorders. Memory was intact by interview

and fair by self-report. No memory problems were reported. Abstract thinking was normal by interview in that he was able to conduct a meaningful conversation. Attention and concentration were normal by interview and fair by self-report. Asked if he has noticed anything wrong with his thinking, he stated that he used to have suicide thoughts, and that he thinks about the drunk driver that killed his mom when he was 12, and about his favorite dog that was run over when he was 10 or 11. Insight was mixed; good in that he realized his legal predicament, and poor in his claim of amnesia of the shootings he is accused of. Furthermore, he enumerated examples of depressive episodes including his parents' divorce, his mom's and dog's deaths, and his past drinking and drugging, but did not include the death of Debra Gardner, who he considered to be his common-law wife. Judgment was poor. The defendant appeared to be of questionable reliability as an informant.

The defendant's mood and affect were normal. Asked about his mood, he stated he "wanted my own and be in peace, but the devil does not want you to be in peace". Asked again about his mood, he said he was happy because "Jesus is in my life". Asked about any depressive episodes, he stated that he was depressed over his parents' divorce, his dog's death, and his mom's death. He also was depressed when he was drinking and drugging in the 80's because he was not satisfied with his frame of mind. He reported that he discontinued substance abuse, but engaged in gambling and in the accumulation of material things, which was also depressing to him. He described himself as good tempered and self-controlled when he

is not substance abusing. He reported no dysfunctions related to his temper.

Vegetative signs were reviewed. He sleeps in peace because of the love of Jesus. His appetite is fair; he fasts for his spiritual growth. Energy level is normal. Asked about his sex drive, he stated he did not have any as "part of self-control". Active suicide ideation was denied.

History. The defendant attended school through the 12th grade, and completed a trade school curriculum in paint and body automobile repair. He also studied auto mechanics in TDCJ-ID. He has worked with his father in auto mechanics and used parts "all my life' He stated that he "worked all the time" He described his father as fair and supportive, and stated that he believed anyone who accepted Christ is now his real family.

The defendant has had two common law marriages. The first marriage from 1984 till 1989 produced a son, now nine. He described the marriage as a beautiful relationship, but they separated because substance abuse led to physical confrontation, and it was time to separate. He and former wife continue to be friends. His second marriage from 1991 till 1995 was with the now deceased complainant. They had no children.

The defendant's medical history was noncontributory. He has no history of psychological treatment. The defendant stated he was raised by an alcoholic grandfather, and began drinking at age seven or eight. His last drinking episode was on the day of the instant conduct charged

when he was drunk, having drank some liquor with friends and a six pack of beer by himself. He considered his alcohol use abusive through the 1980's. He abstained from alcohol between 1988 and 1989, but resumed drinking again in the early 1990's, quitting in 1994. He remained abstinent until one or two weeks before the instant conduct charged. He also admitted to powder and crack cocaine abuse in 1988 and between 1992 and 1993.

Criminal history was reviewed. In 1989 the defendant was convicted of Possession of cocaine, and was sentenced to three years in TDCJ-ID, though he served in jail. In 1990 he was convicted of Delivery of cocaine, and served one year of a ten year sentence in TDCJ-ID. While in prison, he did well with no assaults and no trouble; he worked and attended auto mechanics school. He served another year of jail time for a parole violation, missing three sessions of substance abuse treatment. He was on parole at the time of his arrest.

MCMI-II. The Personality code was: 8B 3 1 2 ** - * 8A +7 4 6A ' // S ** * //. The Syndrome code was: B D ** A * // - ** CC * The test was valid, though he appeared to have magnified the level of experienced illness. Suggested Axis I impressions were:

296.33	Major depression, recurrent, severe without psychotic features
305.00	Alcohol abuse
300.02	Generalized anxiety disorder.

Suggested Axis II impression was a configuration of:

301.22 Schizotypal personality disorder
301.90 Personality disorder NOS (Self-defeating)
301.60 Dependent personality disorder.

Conduct Charged. The defendant said he is charged with Capital murder, shooting and killing his common-law wife and a male companion, and shooting but not killing his half-sister.

The defendant described the conduct charged as follows:

> The defendant was working in his father's business. His wife (Debra) stopped him, along with his uncle John, who was driving his truck. She had come to deliver a change of clothes for the defendant. He bought her gasoline at her request. She told him she loved him and kissed him. The defendant told her he had a bad dream in which something bad happened to her. She said, "I'm all right," and left, supposedly to return to work at her father's business and later to pick up his sister, Phyllis.
>
> He went back to the shop and drank beer and liquor until 10:00 PM. He and his uncle went to shoot pool. They left at 3:00 AM. His uncle dropped him off at his father's house, and he drove home to his wife. He knocked on the front door, but nobody answered. He peeped over the

fence and saw a man on the living room couch. He knocked harder, and when no one answered, he forced the door open and went in. He met his sister, Phyllis, and nobody else, and so he went to the bedroom and saw two men in the bedroom. He and his wife began arguing, and they slapped each other. One of the men held him back and they exchanged words.

The defendant wanted to leave, and packed clothes for himself and his son. The exchange of words with the man continued. The defendant got his tools from the trunk of the wife's car and put them in his truck. He reached out to his wife standing by the door to give her the keys to the car, but she avoided him. She got a knife, and the defendant told her to stab him in the back. The man took the knife from her. The defendant took six to seven beers from the refrigerator and drove off. He ran out of gas by the George R. Brown Convention Center, and had to walk to a service station. While there, he called the house and asked his sister, "Why are you doing this to me?", and asked more questions. He drove to his dad's house, and then returned to his house. He stated that he remembered nothing else from this point on until he was in jail.

In response to questions, the defendant stated that when he first returned to the house, he felt that everything was falling apart. He felt deceived, and as if someone had

stabbed his heart. He was very confused and hurt, and felt like he could just die.

When he left the house after arguments with wife and one of the men, he just wanted to get away because he was very confused; he had suicide ideation. He stated that when he ran out of gas, "dark came over me"; he felt like he was headed toward a cliff without brakes; he was scared and hurt, and he wanted to jump off the freeway. He was in tears.

When he called his sister, he felt "different" from previous wife's infidelities, and just needed to talk to somebody. The conversation did not go well, and he felt he got no answers.

Upon his second return to his house, when the shootings allegedly happened, he stated that he does not remember how he felt. He stated that he and his wife were not separated; he was not living at his dad's house.

Notes of the defense lawyer of witnesses' statements were reviewed. Deputy P. E. McGinty reported that when he arrived at the crime scene on 7/30/95, Harold Ebnezer pointed to the defendant as the shooter of Debra Gardner, Kenneth Butler, and Phyllis Taylor, killing Debra and Kenneth and wounding Phyllis. The defendant admitted to Deputy McGinty that he shot Debra Gardner, and was arrested. Harold Ebnezer told the Deputy that the defendant came at 3:00 or 4:00 AM that morning, and the police was called. The defendant returned at about 7:24 AM with a shot gun and kicked the door in. The defendant

shot at Harold Ebnezer but missed. Harold Ebnezer and Debra Gardner ran out the sliding door, and Harold Ebnezer heard more gun shots inside. Harold Ebnezer jumped the fence and got on the road. Debra Gardner was at this time on the road too and the defendant came out and shot her. The defendant went to a white Jaguar. At 9:15 AM Deputy J. Payne noted that the defendant wanted to use the restroom and said "I fucked up! I shot my sister!" A 22 rifle was found in the trunk of the Jaguar.

Kanetta J. Gardner, a niece of Debra Gardner, reported that the defendant used to date her aunt Debra and was angry at her upon his forced entry for having another man in the house. The defendant hit Debra in the face with his fist in the bedroom. Later that morning, upon hearing gunshots, Kanetta came out of her room and saw Kenny laying on the hallway floor and in the living room saw the defendant laid a gun on the floor while holding another gun. She followed the defendant outside the house and saw him shoot Debra in the street. He retrieved the gun inside the house and put both guns in the trunk of the car.

Shennel L. Gardner, a child of Debra Gardner, reported that her mother Debra had been seeing the defendant for five years. After getting out of jail on 5/95, he stayed with them but Debra got sick of him laying around and not wanting to work. He left and did not come around for two weeks, and Debra started seeing Kenneth Butler. Shennel said the defendant hit Debra in the eye and poured beer on her and left, which Debra reported to the police. Early the next morning after being awakened

by a lot of commotion, Shennel saw Kenneth bleeding on the hall floor and Phyllis in the living room holding her chest and calling the police. Shennel ran outside and saw Debra unsuccessfully trying to stop a car, and the defendant chased Debra and shot her. During the bond hearing, Shennel testified that she was beating on the defendant's back, telling him not to shoot her mother, but he shot her anyway.

Harold W. Ebnezer, a brother of Kenneth Butler, who knew Debra for about six or seven years, reported that Kenneth started dating Debra two days prior. He reported that the defendant forced himself into the house earlier in the evening after Debra refused to answer the door, and started to beat on Debra. Harold and Kenneth put themselves between Debra and the defendant, who picked a fight with Kenneth by inviting him to take care of it outside; he added that he wanted to go back to the penitentiary. Arguments continued for about 30 to 45 minutes, and the defendant called Debra a whore, bitch, and other names. Upon the defendant's second forced entry, he had a shotgun and shot at Harold but missed. Harold ran and told Kenneth in the bedroom that the defendant had a gun, and Kenneth got out of bed and went to the hallway and the shooting started. Harold and Debra went out the bedroom patio door and jumped the fence, and Harold heard three or four shots. Harold started knocking on doors. Harold saw the defendant with his gun follow Debra into the street. Debra went to the car (a blue Chevy hatchback) parked in front of the defendant's car, but it pulled off and left. The defendant said "Look at them run now." Harold ran around the corner till the police arrived

and told the defendant to get down on the ground. Harold told the police the defendant did the shooting, and the police arrested the defendant. Harold saw the defendant laugh like this was funny to him.

CLINICAL IMPRESSION:

Axis I - 303.90 Alcohol dependence, in remission by incarceration
304.20 Cocaine dependence, in full remission by report

Axis II 301.60 Dependent personality features

Axis III - None reported

Axis IV - Psychosocial stressors: incarceration, pending capital murder charge

Axis V - Global Assessment of Functioning: 60 GAF before jail: 50

CLINICAL RECOMMENDATIONS:

1. Substance abuse treatment program:

   A. If released to community:

      1) Relapse prevention groups: 48 weekly sessions and then aftercare.
      2) Supervised antagonist therapies: Antabuse for alcohol and Naltroxene for cocaine.
      3) Random urinalysis at least twice a month.

B. If incarcerated, participate in an in-house substance abuse program.

2. Individual therapy to identify Dependent personality disorder features that may have contributed to the conduct charged and modify them.

FORENSIC RECOMMENDATIONS:

1. Encourage the defendant to recall the remainder of what he did upon his second return to the house, when he was accused of fatally shooting his girlfriend and a male companion, and shooting his sister. The claim of sudden onset of amnesia just prior to the shootings, after a detailed recollection of the rest of the events, is not credible and not psychological supportable.

2. Future Dangerousness, Whether there is probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society? The following factors were considered in answer to the question of future dangerousness: statistical, environmental, and clinical judgment.

I. STATISTICAL FACTORS

1. **Past crimes.** Non-contributory. His past offenses were non-violent drug offenses.

2. **Age.** Decreased probability. He is now 33; street crimes are of lesser probability with this age group and older.

3. **Sex.** Increased probability. Males are more violent than females as a group.

4. **Race.** Black: Increased probability. There is an over-representation of Blacks among the violent offenders.

5. **Socioeconomics.** Stable by self-report: Decreased probability. Unstable by a witness' report: increased probability.

6. **Employment stability.** Stable by self-report: Decreased probability. Unstable by a witness' report: increased probability.

7. **Substance abuse.** Yes for alcohol at the time of the conduct charged, and cocaine by history: Increased probability.

II. ENVIRONMENTAL FACTORS

1. **Family environment.** No exposure to family abuse/violence: Decreased probability.

2. **Peer environment.** Did not Associate with peers that encouraged assaultive crimes: Decreased probability.

3. **Job Environment.** Past jobs were not conducive to violence: Decreased probability.

4. **Availability of victims.** Narrow victim pool: Decreased probability. This appears to be "family" type violence with a conjugal jealousy precipitated by

a perception of wife's infidelity; the victims were not randomly picked. Non-random victimizers are less dangerous than random victimizers.

5. **Availability of weapons.** Yes: Increased probability.

6. **Availability of drugs.** Yes: Increased probability.

III. CLINICAL JUDGMENT FACTORS

1. **Mental Illness.** There is no history of thinking disorder that is associated with assaultiveness. This factor is considered to reduce dangerousness.

2. **Anti-social personality disorder.** The defendant does not meet the criteria of anti-social personality disorder, though he has antisocial features. This factor argues for less probability for continuing violent threat to society.

3. **Specificity of the situation that induced the conducts** charged. **This appears to be a family type violence, influenced by** conjugal jealousy precipitated by his perception of wife's infidelity. This factor argues for less probability for continuing violent threat to society.

4. **Deliberateness.** Insufficient data from self-report. He does not remember shooting the victims, though he admitted to police he did the shootings at the time of his arrest. He appeared to be deliberate from witnesses' statements showing he returned a second time with a gun, forced himself into the house, and ignored pleadings not to shoot: Increased probability.

5. **Remorse**. He does not remember shooting the victim, though he admitted to the police he did the shootings at the time of his arrest: Increased probability.

6. **Post-conducts charged behaviors.**

a. Continuing crimes. None of the versions showed continuing crimes after the conduct charged since he was promptly arrested. This factor is not applicable as he did not have the opportunity to commit more crimes.

b. Fun: From one of the witnesses' statements, he supposedly gloated as people scrambled for safety, i.e., "Look at them run now", and he appeared to laugh like the whole thing was funny. This factor argues for more probability for continuing violent threat to society.

c. Surrender. He peacefully cooperated with his arrest, though the police had a gun pointed at him at the time of arrest. This factor argues for less probability for continuing violent threat to society.

7. **Personal factors that contributed to the conducts charged. There were personal factors reportedly operating at the** time of the conduct charged that may have made the conduct charged specific and limited to this offense circumstance, such that repetition of the offense in the future is unlikely. The apparent motivation was conjugal jealousy precipitated by his perception of his wife's infidelity. This factor argues for less probability for continuing violent threat to society.

9. **Environmental factors that contributed to the conducts charged. There were environmental factors reportedly operating at** the time of the conducts charged that may have made the conducts specific and limited to this offense circumstance, such that repetition of the offense in the future is unlikely, i.e., The presence of individuals that he perceived as participants in the wife's infidelity. He did not hurt the children. This factor argues for less probability for continuing violent threat to society.

10. **Effect of prolonged incarceration.** The defendant is of course less likely to be dangerous while incarcerated. The effect of prolonged incarceration (e.g., aging) in conjunction with physical restraints (e.g., security level and housing), rehabilitative efforts (e.g., education, substance abuse, punishment, psychiatric services) needs to be estimated. The prison system has enough resources to subdue what level of dangerousness he may bring with him: classification/security level system, housing restraints (administrative segregation and super segregation), supervision, crisis intervention (major use of force techniques), and psychiatric medication intervention.

His behavior record in jail and in previous prison stays may be used as a sign that he may do well in prison. He reported no assaults while in incarceration; he worked and attended school. Furthermore, lifers in the prison system tend to do well and better than short termers. The conditions, e.g., more space, less in-cell time, more out-of-cell activities, in prison is less conducive to acting out.

Overall, it appears that, without intervention, the defendant is more likely than not to constitute a continuing violent threat to society. However, if given life instead of death, the prison system has enough resources to safely incarcerate him. Additionally, the factors that can be manipulated and presently contribute to dangerousness can be controlled in prison. He can continue to age in prison; with minimum of 40 years time served, he will be in his 70's at the time of eligibility for discharge. Employment and financial instability is no longer a factor in prison. It is more difficult to gain access to drugs and alcohol and weapons in prison. His victim pool, already narrow in the instant offense because of its family violence features, becomes narrower in prison; furthermore, the prospective victims in prison are less naive in that they are aware of their environment and take the necessary precautions to minimize victimization. The dependent husband/wife relationship, that contributed to the conduct charged, is gone.

Thank you for consulting me on this difficult but interesting case. Please feel free to contact me if you have any questions.

/s/ Walter Y. Quijano
Walter Y. Quijano, Ph.D., P.C.
Clinical Psychologist.

TRANSCRIPT OF PROCEEDINGS, MAY 1, 1997
(OFFICER PAUL MCGINTY)

CAUSE NO. 72810

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

DUANE EDWARD BUCK

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

TRIAL CAUSE NO. 699684
APPEAL FROM THE 208TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS
JUDGE DENISE COLLINS, PRESIDING

REPORTER'S RECORD
TRIAL

May 1, 1997

VOLUME 25 OF 30 VOLUMES

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|16|DIRECT EXAMINATION

BY MS. HUFFMAN:

Q Officer, please introduce yourself to the jury.

A My name is Paul E. McGinty.

Q Deputy McGinty, how are you employed?

A The Harris County Sheriff's Department.

* * *

Q On July 30th of 1995, did you respond to a call to 7327 Puerta Vallarta?

A Yes, ma'am, I did.

* * *

|18|Q When you arrived at 7327 Puerta Vallarta, what did you observe?

A When I pulled down Puerta Vallarta, I noticed a black male on the right-hand side of the road. I went past him and I observed a black female lying in the middle of the road.

Q You say lying in the middle of the road?

A She was in the middle of the road, yes. I believe her head was northbound and her feet southbound and she was lying in a pool of blood.

Q That was in front of the Puerta Vallarta address that you were responding to?

A Yes, ma'am, it was.

Q How far away was the black male that you said that you had observed walking in this neighborhood?

A Within sixty yards of where the lady was in the street.

Q In which direction was that individual [19]walking?

A He was walking away from where she was. I remember seeing him on the side of the road north of the location of where the lady was.

* * *

Q What did you do when you first drove up to the scene?

A I got out of my patrol car and went up to the lady in the street who later was identified and I found out to be Debra Gardner. I told our dispatcher that there had been a female shot in the street

and to send Life Flight and the paramedics en route also.

Q What did her condition appear to be when [20]you observed her at that time?

A She appeared to have been shot in the chest. Her shirt had blood on it. There was blood beneath the body where it had come out of the body.

* * *

Q Was she alive?

A At that time, yes, ma'am.

Q Was she talking?

A No, ma'am.

Q Could you observe anything about her physical condition? Was she trying to breathe?

A She was trying to breathe. She was still moving around but not saying anything that I could understand other than showing that she was in a good deal of pain.

Q After you had determined her condition and called for assistance, what did you do next?

[21]A I heard someone yelling towards me.

Q In which direction was that yelling corning from?

A It was coming from behind me because I was facing south so it was coming from the north.

Q What did you do when you heard this yelling?

A I turned around.

Q What did you observe?

A I observed two black males running towards me.

Q Did you recognize one of the black males as someone that you had seen previously?

A The closest black male to me was the black male on the side of the road which I first saw as I was corning down Puerta Vallarta.

Q The second black male, did you recognize him?

A At that time, no. That was the first time that I had seen him.

Q How far away was the black male that you didn't recognize? How far away was he from this other black male?

[22]A Probably ten to twenty yards further north away from where the first black male was.

Q So they were ten to twenty yards apart?

A Yes, ma'am.

Q What did you do?

A I turned around because the male further from me was yelling: "He shot her. He shot her."

Q When you heard this man saying, "He shot her, he shot her," what did you do?

A I pulled out my service revolver and I took the closest black male to me into custody.

Q How did you do that?

A They were running toward me. I pulled my service revolver out and told him to lay down on the ground and he did. I took him into custody.

Q When he laid down on the ground, what did you do?

A I went up to him and handcuffed him, patted him down, and put him in the back of my patrol car.

Q Did you find any weapons on him at that [23]time?

A No, ma'am.

Q Where was your patrol car?

A It would have been one house north of 7327 Puerta Vallarta.

Q You placed him in the back seat of your patrol car?

A Yes, ma'am.

Q Then what happened?

A And then I went back to where Ms. Gardner was lying in the street. About that time a lady comes out of the house and is standing in the driveway. It turns out that her name is Phyllis Taylor, and she has a gunshot wound to her chest.

Q But she was still walking?

A Yes, ma'am.

Q Did she say anything to you?

A She was screaming. She was hysterical and it was very hard to understand what she was saying. I go to her but it's very difficult to understand --

MR. EASTERLING: I'd object to hearsay.

[24]THE COURT: Overruled.

A I had a hard time understanding her. I get enough information out of her to know there's probably a DOA in the house.

* * *

[25]Q What did you find inside the house?

A Inside the house we went through the family living room, the hallway that goes to the bedrooms, and in that hall was a black male that was laying face down.

Q What was his condition?

A He had a gunshot wound to the chest. His shirt was bloody and there was blood [26]on the carpet. The EMT pronounced him DOA.

* * *

Q Did you find any other witnesses in the home?

A Yes, ma'am. Whenever we went into the house, there were several children that were coming out of the house. It was a very chaotic scene because the kids were screaming.

Q What condition were the children in?

A Well, the children's physical well-being was fine but they were screaming because [27]they were scared. They were crying and wondering what was going on.

Q What were the ages of the children, if you recall?

A I believe their ages were from about two to twelve.

Q Were some of these children determined to be witnesses when this had occurred in the house?

A Yes, ma'am.

Q Because they were witnesses, what did you do?

A I got all the children together, and as other units arrived they were assigned different spots. Life Flight was en route. Life Flight landed and left. There were officers given responsibilities to secure the scene inside the house and outside the house, some had duties to keep witnesses away from each other and to keep people that were coming by to see what had happened, to keep them away from the scene. I took the kids and we went to the house next door.

[28]Q Eventually did the Homicide Detectives show up to talk to witnesses and gather evidence there at the scene?

A Yes, ma'am, they did.

* * * *

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* * *

[90]DIRECT EXAMINATION

BY MS. HUFFMAN:

Q Sir, please state your name for the ladies and gentlemen of the jury.

A Harold Ebnezer.

* * *

Q Did you know the deceased in this case, Kenneth Butler?

A It's my brother.

* * *

[95]Q Do you remember approximately what time [96] that you left the game room that night?

A We left the room at closing.

* * *

Q Who all went to Debra's house from the game room?

A Just me and my brother Kenneth and Phyllis and Debra.

Q Was there anyone else at Debra's house when you got there?

A Yes, the kids. There was Phyllis' little baby and Debra's kids, Debra's three.

* * *

[97]Q Do you remember what room in the house you were in?

A We was in the living room.

Q At some point as you sat in the living room that night, did something unusual occur around near the door?

A Yeah, we was sitting there and we was laughing and joking and, you know, there came a big old boom, boom, on the door.

* * *

[98]Q What did Debra do when she heard the bang at the door?

A She picked up the telephone and dialed 911.

* * *

Q After you heard the banging and you heard Debra pick up the phone, what is the next thing to happen?

A Debra asked us to go to the back of the house, just to go to the back of the house. She didn't want any type of problems.

99]Q Did you do that?

A Yes, I did.

Q Did someone else go with you?

A No, Kenneth went in one room and I went in another room.

Q Were the kids back in that part of the house?

A Kenneth was in the back room where the kids was.

Q What's the next thing that you remember happening?

A The next thing I remember is he kicked the door in and he comes on in. He walked all the way into Debra's house. Okay, I'm standing in Debra's bedroom.

Q Let me stop you for a minute. When you say he, is he the person in the courtroom today who came into Debra's house after he kicked the door in?

A Yes, ma'am, he's sitting right there.

Q What's he wearing?

A He's wearing a burgundy shirt or maroon or whatever you want to call it.

MS. HUFFMAN: At this time may the record reflect that the [100]witness has identified the defendant, Duane Edward Buck?

THE COURT: The record will so reflect.

BY MS. HUFFMAN:

Q When you say he walked in, where were you standing at that time?

A Debra's bedroom.

Q Inside the door or where were you standing?

A You see, from the hallway when you come in Debra's bedroom like this, I'm like standing right here, so it's a part right here that you have to walk past. When he walked past this way, when he walked all the way in the room and saw me standing right there, Phyllis told him that I was her friend.

Q Where was Phyllis?

A Phyllis and Debra came in the room right behind him.

Q They were following him?

A Yes.

Q What were they saying?

[101]A Well, he was the one that was doing all the hollering and goings on here, you know. I didn't really know what was going on.

* * *

Q Was he saying something?

A He was hollering. He was cursing her out and stuff like that.

* * *

Q Did he appear to be -- what was his demeanor? Was he angry or was he calm?

A No, he was upset.

* * *

[102]Q Mr. Ebnezer, let's go back to where you were in the bedroom area and Mr. Buck has come into that back area.

A He started fighting on Debra.

Q What do you mean by that?

A Hitting up side the head, slapping her up side the head.

[103]Q Do you know how many times he hit her? Do you remember?

A He hit her two or three times before I got between them.

Q How did you get between them?

A All I did was walk in between them and kept them an arm's distance apart, him an arm's distance apart, because she wasn't trying to get at him. He was steadily trying to get at her.

Q Was that all that happened in the back bedroom area?

A Yes, ma'am, it was.

Q Can you estimate about how long that went on? Was it just for a few minutes, a few seconds, or how long?

A It went on maybe for five or ten minutes.

Q What happened after that incident happened back there in the bedroom area?

A We finally made it back up into the front of the house.

Q Then what happened?

A Mr. Buck there, he kept on trying to challenge me and my brother to a fight.

* * *

[104]Q Did you ever assault or strike Mr. Buck [105]in any way?

A No, ma'am. No, ma'am.

Q After you said he was challenging you to a fight, what did you recall happening next?

A I think to the best of my ability I believe I went and sat on the couch. I kept asking Phyllis to tell him to shut up because Phyllis is telling me this is her brother. So I'm telling Phyllis that she needs to tell her brother to shut up because he stayed talking this trash, you know, like he Mr. Big.

Q Where were you while this was going on?

A In the living room.

Q Did Debra ever give the defendant anything?

A He said he came there for his clothes. All he said was that he came there for his clothes.

* * *

Q What happened then?

A She gave him his clothes and he stayed there. He stayed there. He said he was [106]going to wait until the police got there so he could tell them that he kicked the door in.

* * *

Q Did he at some point leave?

A He left.

* * *

Q Did you talk with him before he left?

A Yeah, we talked. We told him like it was. We didn't want to be in their business, you know. My brother even tried to tell him he understood how he might feel, you know, if he was to come to his house and another man, you know, is there. You know what I'm saying? You got to understand what I'm saying.

Q Did your brother explain to him that you [107]were all friends with Debra?

A We tried to but he didn't want to listen.

* * *

Q Did he seem calmer to you when he left?

A Calmer than when he got there.

Q After he left, what did you do?

A After he left, you know, we sat there for awhile and we were talking about the situation, you know, and I fell asleep on the couch. Phyllis fell asleep on the couch. Debra fell asleep in the living room but it's really like the dining room. She fell asleep on the couch over there.

Q Where was Kenneth when you fell asleep?

A When I fell asleep, he had went to Debra's bedroom and laid across her bed [108]and went to sleep.

Q You all had visited for awhile after Mr. Buck left?

A Yes, ma'am.

Q Do you recall about what time you fell asleep?

A I guess it might have been maybe 4:30 or 5:00, or maybe a little later. I don't remember.

Q At some point as you were sleeping, did something wake you up?

A Yes, ma'am.

Q What did you hear?

A A boom at the door again.

Q What kind of boom?

A Like somebody beating out the door again.

Q What did you do when you heard the noise at the door?

A I jumped up because after what went on before, I knew it was him. I knew he was coming back so I jumped up. I was going to open the door and jump his behind. To be honest with you, he was going to get it.

[109]Q Did you have any weapons?

A No, ma'am.

Q When you say he was going to get it, what did you mean?

A I mean I was going to put these hands on him.

Q After you heard the boom at the door, the bang at the door, what happened next?

A After I heard the banging, you know, I went to the door and I tried to open the door but I couldn't get it open, you know, because after the first time he kicked it in, he messed up the lock. So I told him -- he say, "Open the door, Man," and I said, "Well, Man, I would open the door but you messed up the lock when you kicked the door in the first time."

* * *

[110]Q What did he do?

A He kicked the door in. He kicked the door once, you know, and I was standing right in front of the door. The first time that he kicked it, if it had flew open, it would have hit me right in the face because I was standing that close to the door. I took a step or two back. He kicked it open again, and when it opened, it flew open, he came in with a shotgun in his hand and raised it up and fired it at me.

* * *

Q At the time that he came in that time, did you expect that he was going to have a weapon?

A No, ma'am, I didn't.

Q Did you even dream that he had a weapon?

A No, ma'am, I didn't think he was coming back because he was in that calm a state when he left. He had nothing to come [111]back for.

* * *

Q At what point did he fire the shotgun?

A As soon as he stepped in, he fired it. He fired it as soon as he stepped in.

Q Where were you standing?

A Directly, directly in front of him.

Q What did you say when you saw him point the shotgun at you?

A When he kicked the door in I asked him, "Man, what is this?" He says, "This," and he raised it and fired it. When he do that, I do like this and the shell flies right past me and hits the wall. I turn around and see the hole in the wall so I take off running through the back because Debra's got these patio doors, glass patio doors in her bedroom.

* * *

[113]Q You said that after he shot you looked back and you saw a hole in the wall; is that correct?

A Yes.

Q And you took off running?

A Yes, ma'am.

Q Who was in the living room at that time?

A Phyllis was in the living room. Debra had -- she had hooked them. She was running. She was trying to run also.

Q Which way did you run?

A I ran through the hallway back into Debra's bedroom and went out the glass patio doors. Right here there was a fence. Debra was trying to get over the fence so she was in my way so I ran on around the house, but as I'm running around the house I hear two or three [114]more shots going off inside the house.

* * *

Q When you're running down the hall and out of the house, did you see your brother in Debra's bedroom?

A Yes, ma'am, I ran past him.

Q What was he doing?

A Standing there.

Q What?

A He was in Debra's bedroom. He was standing right at the patio doors.

Q Did you say anything to him?

A Yes, I touched him and I said: "Look out, Kenneth. He got a gun."

Q What did you do then?

A I kept going out the door. I'm thinking my brother is behind me.

Q Was he behind you?

A No, ma'am, evidently he didn't come.

Q You said when you got out of the patio door that you could see Debra. Where was she?

A Okay. As you go out the patio door, [115]there's a fence line there. She was right at the fence line, you know, trying to get over the fence.

* * *

Q Was she successful in getting over it?

A No. She had a hard time trying to get over the fence. That's what made me head the other way.

Q Which way did you go?

A I went out -- after I seen her trying to jump this fence, I went to the back of the house.

Q At what point did you say you heard three or four more gunshots?

A As I was running around the back of the house.

Q Then where did you go?

A I went over the fence. Finally after I got over that fence, I come around to the front of the house and I started running down the sidewalk. As I was running down the sidewalk I'm looking back. Debra had run out to the street. [116]Somebody had come with him. They were in a blue car.

Q Mr. Ebnezer, you didn't see anybody come with the defendant; is that correct?

A No, ma'am.

* * *

[117]Q When you went out there, you saw another car? What was Debra doing in relation to that other car?

A Debra, she ran over to the driver's side of the car and she tried to get in the back seat of the car. She told them, she said: "Y'all, let me in. He got a gun."

Q What did the people do?

A They drove off and left her in the middle of the street.

Q Where were you when you saw Debra trying to get help from that car?

A I had just come from around the back of her house. I had just come back from there where I got over the fence. I was just striking out down the sidewalk.

Q So she beat you out into the street?

A Yes, ma'am, she did.

Q Did you continue to look back towards the front of the house as you ran off?

A Yes, ma'am, I looked back.

Q What was she doing?

A Well, after the car drove off, he was [118]running right up to her.

Q Who is he?

A Buck here.

Q Did he have anything in his hands?

A Yes, ma'am, one of these rifles.

* * *

Q What was Debra doing?

A She was in the middle of the street pleading with him.

* * *

Q At some point did you quit watching what was happening there in the street?

A Yes, ma'am, because I was trying to get close to somebody's door so I could knock on the door and ask them to call the police.

* * *

[119]Q At some point did you find someone where you could get to the door and they could help?

A Yes, ma'am. I finally got to a door and beat on it and somebody walked over and I asked them to call 911 because somebody had been shot. Then I

gave them my brother's phone number and asked them to call my brother.

Q Do you know if they called 911?

A Somebody did.

Q After you had been at that house and asked somebody for help, what did you do next?

[120]A Well, I stayed there for a moment, you know, because I'm looking to see if he's coming around the corner. Actually, you know, I don't know what to do.

Q What did you do when you finally did something?

A I ran back around the house once I heard the police coming. I heard the sirens.

* * *

Q Where did you go when you heard the sirens?

A I turned around and headed back to the house.

Q What did you see when you got back to the house?

A When I got back to the house, or before I got back to the house, the officer was standing over Mr. Buck. He had him face down on the ground. He was standing over him and he was shouting

to Debra's daughter: "Is this the shooter?" I run up to him and told him he was the one.

Q Did you tell the police officer at some point about what you had witnessed and [121]what you believed to have happened?

A No. What I remember is that the Deputy put him in the car, and by the time he put him in the car, I went back to try to help Debra and do whatever I could.

Q What was Debra doing?

A Debra was laying in the middle of the street. She asked me, she kept asking me to put pressure on her back because she couldn't breathe.

Q Did you see blood on her?

A Yes, ma'am, she had blood all over her.

Q Was she trying to breathe?

A She was trying.

* * *

Q After you tried to help Debra, what did you do?

A I looked and seen Phyllis had come outside. She was sitting on the ground there and I went to

check on her to see if she was all right, and then I went [122]back in the house, you know, because I was looking for my brother because I noticed my brother was not nowhere.

Q At that point did you know your brother had been shot and killed?

A Not until I got in the house and seen him.

Q When you went in the house, what did you see?

A I seen my brother in the hallway laying face down.

Q What did you do?

A I turned him over and held him.

Q Was he alive?

A No, ma'am, he was already dead.

Q At some point did you meet with the police later in the day and give them a written statement about what you had witnessed?

A Yes, ma'am, they took me from the scene.

Q Down to the Police Station?

A Yes, ma'am.

Q Before you went down to the Police Station did you have the opportunity to see Mr. Buck again?

[123]A Yes, ma'am.

Q Where was he when you saw him again?

A In the police car.

Q What was he doing in the police car?

A He was laughing and joking and taunting the rest of my family. He's sitting up there and laughing. He just killed two people and he's sitting up there and laughing and taunting and joking about it.

* * * *

TRANSCRIPT OF PROCEEDINGS, MAY 1, 1997
(PHYLLIS MARY TAYLOR)

CAUSE NO. 72810

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

DUANE EDWARD BUCK,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

TRIAL CAUSE NO. 699684
APPEAL FROM THE 208TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS
JUDGE DENISE COLLINS, PRESIDING

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* * *

[201]DIRECT EXAMINATION

BY MS. HUFFMAN:

Q Ma'am, please introduce yourself to the jury.

A Hi. My name is Phyllis Mary Taylor.

* * *

Q Ms. Taylor, do you know the defendant, Duane Buck?

A Yes.

[202]Q How do you know Duane Buck?

A He's my stepbrother.

* * *

Q You consider him to be your brother?

A Yes.

Q Were you raised in that manner, as brother and sister?

A Yes.

Q Did you know Debra Gardner?

A Yes.

Q At the time of her death, how long had you known her?

A Approximately seven years.

Q What kind of relationship did you have with Debra?

A She was my best friend. She was more like a sister.

Q Do you know the relationship, if anything, that was between Debra Gardner and Duane Buck?

A Yes.

[203]Q What kind of relationship did they have to your knowledge?

A To my account, one time they were a pretty good couple. They were breaking up and then they'd get together, break up and get together.

Q So it was an off and on relationship?

A Yes.

Q The week prior to Debra's death, what had happened in the relationship?

A Approximately two weeks before the incident they had broke up, separated.

* * *

[204]Q The night of July 29, 1995 and the early morning hours of July 30th of 1995, where were you that evening?

A I was with Debra, Harold, Kenneth, and Kenneth's sister and brother.

Q Where had you been?

A We had went to a game room.

* * *

[205]Q When you were at the game room, do you remember about how long you stayed at the game room?

A About an hour.

Q What were you doing there?

A We played games, shot pool.

Q When you left the game room, where did you go?

A We went to Debra's house.

[206]Q Who all went to Debra's house?

A Me, Debra, Harold, Kenneth, and some of the brothers and sisters was going to meet us there at the house but they never showed up.

Q What did you do once you got to Debra's house?

A Our plans were to play cards, but we all ate and then right after we finished eating is the time when Duane came and kicked the door in so we didn't get a chance to play cards.

Q Where were you when you said Duane kicked the door in?

A I was in the living room. I was going to open the door but Debra for some reason didn't want the door opened.

Q Did you know it was Duane at the door?

A Yes.

Q How did you know it was your brother?

A Because I could hear his voice. He was screaming and hollering open the damn door.

Q Was the door opened?

A No.

* * *

[207]Q At some point did you see your brother?

A After the door was kicked in.

Q Was the door kicked in right away, or how long did it take before the door got kicked in?

A Approximately, I guess, about seven minutes.

Q Once the door was kicked in, what happened?

A When the door was kicked in, we were in the bedroom, and he came in and asked what was going on. We said nothing. Then he started to jump on her.

Q On who?

A Debra.

Q What do you mean by jump on her?

A Fighting. He started fighting her, trying to fight her.

* * *

[217]Q Ms. Taylor, after you had the conversation in the kitchen with the defendant, do you recall what happened next?

A After that they continued arguing and I think Duane had got some things of his, and then he left.

* * *

[218]Q When he left did you think that everything was settled?

A Yes.

Q Or did you think everything was still up in the air?

A No, he hugged me and kissed me and told me that he was sorry for the behavior, the way he carried on, and he shook Harold and Kenneth's hands and said he was sorry and he left.

Q At some point did you know whether or not the police came?

A When the police arrived in forty-five minutes, Duane had made it back to Northeast Houston and he had phoned back to the house; and about the time that he phoned, the police was knocking at the [219]door.

* * *

Q Did you talk to him?

A I talked to him.

Q What was the conversation about?

A He asked me to let him speak to Debra.

Q Did you do that?

A I told Debra that he was on the phone and wanted to speak to her but she didn't want to get on the phone.

Q Did you tell him that?

A Yes, I did.

Q Did she ever talk to him on the phone when he called back?

A No.

* * *

[220]Q What kind of things were you telling him?

A Nothing. He just kept telling me to put Debra on the phone and I kept telling him that she didn't want to get on the phone. After that he hung the phone up in my face.

* * *

Q Had Debra gone out and talked to the police?

A Yes.

Q At some point did she come back inside?

A Yes.

* * *

Q When Debra came back into the house after talking to the police, what did you all do?

A After that we sat on the couch just talking about things that had happened. Before I knew, everyone fell asleep.

Q Where did you fall asleep?

A On the couch.

* * *

|221|Q What woke you up?

A I heard the banging at the door but I didn't get up right then. Debra came and woke me up and told me that Duane |222|was back at the door and to get up. I sat up on the couch.

Q Did you get up from the couch?

A No.

Q Did you see Duane?

A Yes.

Q What was he doing?

A Well, he kicked the door in again, and when he kicked the door in, Debra and Harold took off running because he said for everybody to run because he had a gun, but I just sat there. I couldn't move. I guess I was in shock. I didn't move right then. I just sit there.

* * *

Q When is the first time that you remember seeing him with a gun?

[223]A I finally seen the gun when he come through the door.

Q Where did you see the gun?

A In his hands.

Q How was he holding the gun?

A Like this.

Q Pointing it out?

A Yes.

Q Then what did he do?

A After that he came up to me.

Q Where were you?

A I was sitting on the couch.

Q What did he do?

A He approached me. I was asking him what he was doing, and I begged him not to shoot me because, you know, nobody deserves to be shot. He said: "I'm going to shoot your ass too." Then he put the gun to my chest and pulled the trigger.

* * *

|225|Q You're sitting there on the couch?

A Yes.

Q What did he do with the gun?

A He put it like this.

Q What did he say?

A He says: "I'm going to shoot your ass too."

Q What did you say?

A I begged him, I said: "Duane, please don't shoot me. I'm your sister. I don't deserve to be shot. Remember I do have children." And he says: "I'm going to shoot your ass too."

Q What did he do?

A He pulled the trigger.

Q Did the gun fire?

A Yes.

Q Did you have a wound in your chest as a result of that gunshot?

A Yes.

* * *

[226]Q After he shot you, Phyllis, what did you do?

A I just sat there.

Q Did you realize that you had been shot?

A Yes.

Q What were you feeling?

A Actually I couldn't believe that I was shot. I just sat there and I said a prayer.

Q Did you try to help yourself?

A I just put my hand here. I couldn't believe he actually shot me. I just sat there with my hand over it.

Q Do you remember hearing anything when you are sitting there holding your chest?

A Yes.

Q What did you hear?

A I heard more gunshots.

Q Do you know how many more gunshots you [227]heard?

A It was either one or two.

Q Where were they coming from?

A They were coming from the back of the house towards the bedrooms.

Q At some point did you get up?

A Yes.

Q Where did you go?

A I walked through the house trying to get to a telephone.

Q What did you see?

A I saw Kenneth lying on the floor.

Q What was Kenneth's condition?

A He was shot face down.

Q What did you do?

A I looked down to see if he was breathing. He wasn't breathing.

Q Did you see any of the kids around at that point, or do you remember?

A Not at that particular time.

Q What did you do then?

A I then approached Debra's son's room, Devon. When I went into his room, I opened the closet and Devon and Kanetta were in the closet. I shut the closet |228|door back and went to the telephone and dialed 911.

Q Did you talk to a 911 operator?

A Yes.

Q Did you tell them that you had been shot?

A Yes.

Q You've heard the 911 tape?

A Yes.

Q Does your voice appear on that 911 tape?

A Yes.

Q At some point you say something about three or four in reference to -- what were you talking about? It sounded like you said you had been shot like three or four times? What were you saying?

A I told her I needed help because I had been shot in the chest, and I said that there were three or four more people that had been shot. I know that Kenneth had been shot so by hearing the other gunshots, I didn't know who else was shot.

Q You talked to the 911 operator, but did you have a long extended conversation [229]with them?

A No. The phone was disconnected.

Q What did you do then when you thought you were disconnected from 911?

A After then I called my house and no one answered. Then I called my father.

Q What did you tell your father?

A I told him that I had been shot in the chest and that it was getting hard for me to breathe and I needed some help. I didn't want to die. He asked me did I know who shot me and I told him yes. He asked who shot me and I told my stepbrother Duane, and at that particular time I heard him talking so I hung up the phone and got in the closet.

* * * *

TRANSCRIPT OF PROCEEDINGS, MAY 2, 1997
(PHYLLIS MARY TAYLOR)

CAUSE NO. 72810

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

DUANE EDWARD BUCK,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

TRIAL CAUSE NO. 699684
APPEAL FROM THE 208TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS
JUDGE DENISE COLLINS, PRESIDING

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* * *

[241]Q When you walked out, did you see the defendant? Did you see Duane Buck, your brother?

A Yes.

Q Where was he?

A He was sitting in the police car.

Q What was he doing?

A He was laughing.

Q Did you say anything to him?

A No.

Q What did you do?

A By then I had put my hand down and one of the guys had realized I was shot so they told me to sit on the ground.

Q Did you do that?

[242]A Yes.

Q Did you have a chance to walk over to see

Debra?

A No, I got halfway to her.

Q But you could see Debra?

A Yes.

Q What was going on around Debra?

A She was laying there saying "Help me, help me. Somebody please help me. I can't breathe."

Q Did she appear to be bleeding?

A Yes, she was in a puddle of blood.

Q After the people there realized that you had been shot, what did they do to help you?

A I started coughing up blood so they gave me oxygen and by then Life Flight had landed and they put me on a stretcher and took me by Life Flight to Herman Hospital.

[243]Q Tell us what happened when you got to the hospital?

A When I got to the hospital, I immediately went into surgery.

Q What did they do in surgery?

A They put in a chest tube into my chest.

Q Did you later learn where the bullet had gone in

your chest?

A Yes.

Q Where did it go?

A It went into my chest about an inch from my heart and it landed in the back, in my back, in my shoulder blade.

Q How long were you in the hospital the first time that you were admitted on the 30th day of July?

A Approximately two weeks.

Q During those two weeks, what kind of treatment did you have?

A I had X-rays just about every day. They checked my chest tube and blood.

Q Were you in pain?

A Yes.

Q Did you have any follow-up surgery or [244]treatment as a result of that gunshot wound?

A Yes.

Q When was that?

A If I recall, it was in October of '95.

Q What happened then?

A They removed the bullet.

Q Why did you go some months before they removed it?

A Because I was having difficulty with the usage of my arm. It continued to bother me so I talked to my doctor about removing it.

Q Did he agree to do that?

A Yes.

Q What about now? Do you have any symptoms, any follow-up symptoms as a result of that wound?

A Yes. Sometimes my arm goes out on me. It's hard to lift things every now and then.

* * * *

TRANSCRIPT OF PROCEEDINGS, MAY 2, 1997
(DEVON GREEN)

* * *

[272]DIRECT EXAMINATION

BY MS. HUFFMAN:

Q Would you please state your name for the jury?

A Devon Green.

Q Devon, how old are you?

A Thirteen.

Q Do you go to school?

A Yes, ma'am.

Q Where do you go to school?

A Spring Forest Middle School.

Q Who do you live with now?

A Doris Gardner.

Q Who's that? How is she related to you?

A My aunt.

Q Who else in your family now lives with Doris?

A My cousin Kanetta.

* * *

Q Did you all used to live together?

[273]A Yes, ma'am.

Q Where did you used to live together?

A In Alief.

* * *

Q Who did you live with?

A With my mom.

Q Who was your mom?

A Debra Gardner.

Q She's now dead?

A Yes.

Q Do you remember your address where you lived over in Alief?

A No.

Q Was it on Puerta Vallarta Street?

A Yes, ma'am.

Q Is that the house where your mom was killed?

A Yes, ma'am.

* * *

[275]Q On the night your mom was killed, do you remember who all was at the house?

A If I remember, Harold, my mom, my sister, my cousin, me, Kanetta and Soria (phonetic spelling).

Q Keshawn and Soria were the little ones?

A Yes.

Q They were toddlers?

A Yes.

Q Were you awake the first time that Duane Buck came over in those early morning hours?

A I was asleep but I heard a bunch of noise and woke up.

Q Where were you sleeping?

A In my bedroom.

Q Was anyone else with you?

[276]A My cousin.

Q Who is your cousin?

A Kanetta.

* * *

Q What did you do when you heard that noise?

A I went in the living room to see what was going on but they were in the hall.

Q What did you seen when you were in the hall?

A Duane was trying to grab my mom and take her in her room.

* * *

[277]Q What happened after that? Do you remember?

A Somehow they were in the kitchen.

Q What were you doing during that time?

A I was just standing there looking and holding my sister.

Q Were you afraid?

A Yep.

Q What happened after they went to the kitchen?

A Him and Phyllis started talking to each other. He picked up a stick and raised it up and said he would hit her with it.

Q Did he hit her with it?

A No.

Q What did he do with the stick?

A He had put it down.

Q What else do you recall happening during that time?

A They was talking and then he left.

Q Do you know how long he was there?

A About thirty minutes.

* * *

[278]Q After he left, what did you do?

A We just stayed there for a little while and then we went back to sleep.

Q Where did you go to sleep?

A Back in my room.

Q Who was with you this time?

A My cousin.

Q At some point were you awakened?

A Yes, around 6:00 o'clock.

Q What woke you up?

A A gunshot.

[279]Q One gunshot?

A Yes.

Q Did it sound like it was outside or inside?

A Inside.

Q What did you do when you heard the gunshot?

A Me and my cousin woke up and went in the closet.

Q In your bedroom?

A Yes.

Q What happened after that?

A I heard a lot of yelling.

* * *

Q Did you recognize any of the voices?

A Yes.

Q Who did you recognize?

A I knew it was Duane yelling.

Q Let me ask you this. Did you know where Kenneth was?

A No.

Q Did you hear Duane say something to Kenneth?

A Yes, he said something like he was [280]sleeping with my wife or something like that.

Q Where did you hear the voices coming from?

A The hallway.

Q Next to your bedroom?

A Yes.

Q After you heard Duane say that, what did you hear?

A I heard the gunshot.

* * *

Q Could you point out for the jury which room you were in and which closet you were hiding in?

A (Indicates.)

[281]Q Right there?

A Yes.

Q That's where you heard Duane say something to Kenneth?

A Over here out of the closet.

Q Tell the jury where you were when you heard that?

A Right here.

Q You can have a seat.

After you heard the gunshot, what did you do next?

A I went outside to see who had got shot.

Q Was that immediately afterwards?

A Just about two or three minutes later.

Q So you waited a little while?

A Yes.

Q Were you scared?

A Yes, ma'am.

Q When you opened the door, what did you see out in the hallway?

A I just saw Kenneth leaning up against a wall and my sister trying to help him.

Q What sister?

A Shennel.

Q What did Kenneth look like?

[282]A He was like he was shot.

Q Did you see any blood?

A He was throwing up a lot of blood.

Q Was he saying anything?

A He was trying.

Q What was he saying?

A He was trying to tell my sister to call the police. Then he started talking about something else, and then I left.

Q Where did you go?

A I went to the restroom with my cousin.

Q Which cousin?

A Kanetta.

Q What were you doing in the restroom?

A She was in the restroom looking in the mirror.

Q Was she scared?

A Yes, it looked like she was.

Q Do you think she was in some kind of shock?

A Yeah.

Q What did you do next?

A I left. Me and my sister went outside.

Q Which sister?

A Shennel.

[283]Q Where did you go?

A We went out and we seen Duane running after Harold.

* * *

Q Where did you see Duane?

A He was right next to the front of the garage running after Harold.

* * *

Q What happened after you saw Duane going after Harold?

A He started saying: "Punk, you better keep running and don't come back."

* * *

Q You're going to have to slow down. Where was your mother?

A At first she was running outside on the [284]street and then a car pulled up and stopped.

* * *

Q What did your mom do with the car?

A She went to the window and told them to open the door.

Q Did they help her?

A No, they drove off when they seen Duane coming behind her.

Q What was he doing when he came up behind your mom?

A He was talking but I couldn't understand what he was talking about.

Q Did he have anything in his hand?

A He had a gun in his hand.

* * *

Q What was your mom doing?

A She was -- she had turned around and [285]said: "Please don't shoot me. Please don't shoot me. Why are you doing this in front of my kids?"

Q What did Duane do then?

A He just shot her.

Q He pointed the gun directly at her?

A Yeah.

* * *

Q What did you do when you saw him shoot your mama?

A We didn't know why he shot her.

Q What was Duane doing?

A He was walking back towards the garage.

Q What did he do when he got back towards the garage?

A He got another gun out of the garage.

Q He had two guns then?

A Yes.

Q What did he do then?

A He put them in the trunk of the car.

Q Where was the car parked?

A Like on the bumper (sic) of the sidewalk.

Q Where did he put the guns?

[286] A Into the back or trunk of the car.

Q What did he do after that?

A He tried to start the car. He came back up to my mom and he said: "It ain't funny now. You ain't laughing now."

* * *

Q Was your mother laying there bleeding when he said that?

A Yes.

* * *

[287] Q After he did put the guns in the trunk, then he tried to start the car?

A Yes.

Q What happened then?

A It wouldn't start.

* * *

Q Did he stay in the car for awhile trying to start it?

A Yes.

Q Then what happened?

A He opened the hood of the car and tried to see what was wrong with it.

Q Did he fix it?

A No, ma'am.

Q What happened after he kept the hood up and couldn't fix it?

A He just messed with it awhile and then started to walk down the block?

Q He started leaving?

[288]A Yes.

* * *

Q At some point right after that did you see the police?

A Yeah.

Q Did you see the police take him into custody? Were you inside or outside?

A I was outside when the police drove up. Duane was acting like he ain't done nothing. He was walking slow so I told the police that was him.

* * * *

TRANSCRIPT OF PROCEEDINGS, MAY 2, 1997
(SHENNEL GARDNER)

[301]DIRECT EXAMINATION

BY MS. HUFFMAN:

Q Would you introduce yourself to the jury, please?

A Shennel Gardner.

Q How old are you, Shennel?

A Fifteen.

Q Do you go to school?

A Yes, I do.

Q Where do you go to school?

A Forest Brook.

Q Speak into the microphone. Where do you go to school?

A Forest Brook.

* * *

Q Who do you live with, Shennel?

A My grandmother.

Q What's her name?

A Annie Gardner.

[302]Q How long have you been living with your grandmother?

A About two years now, going on two years now.

Q Where did you live before you lived with your grandmother Annie Gardner?

A With my mother, Debra Gardner.

* * *

Q On Puerta Vallarta Street?

A Puerta Vallarta Street.

Q How long had you lived at that address before your mom was killed?

A I guess going on a year.

Q Who all lived at that house?

A My mother, me, my brother, my sister Kanetta.

Q Do you know a Duane Buck?

A Yes, I do.

Q How do you know him?

A He was my mom's friend.

Q Did he stay with you at your house on Puerta Vallarta sometimes?

A When we first moved in he wasn't there but he came off and on.

* * *

[303] Q The night before your mom was killed or in the early morning hours before your mom was killed, were you awake or asleep in the early morning hours?

A I was awake because my leg was cramping.

* * *

[307] Q Do you know whether or not during the first time that he came over if someone had called 911?

A Yes.

Q Who called 911?

A Me.

Q Had your mama called before?

A Yes.

* * *

[308]Q Do you remember what you told them?

A I told them to send the police because someone here was trying to jump on my mama.

Q Why did you call 911?

A Because I was afraid. I was nervous.

Q At some point did you see Duane leave?

A Yeah, he was getting into the truck.

* * *

[309]Q After the police came, what did you do?

A We went back in and got settled and went back to bed.

* * *

Q You're going to have to slow down. We'll [310]take this a question at a time. What woke you up? Do you know what woke you up?

A Phyllis. You know when you sleep, you still can feel anything going on around you, and then I

seen her on my phone trying to get somebody on the phone and she was holding her chest. I said: "Phyllis." I went up to her like that and I seen blood running out.

Q Did you call 911 again?

A Yeah.

* * *

[311]Q You could hear people arguing?

A Yeah, a commotion.

Q What do you mean by commotion?

A Commotion is like "Don't shoot me. Get out of my house." There was arguing. I'm crying on the phone trying to get the police to come. There was a whole lot of commotion.

Q At some point did you leave your room?

A Yes.

Q What did you see when you left your room?

A As soon as I left my room, there in the hallway was Kenneth Butler. I thought he was shot in the mouth because all I seen was blood coming out of his mouth.

Q When you saw him out there in the hallway, did you stop to talk to him?

A Yes, I was trying to see if he was alive.

Q Did he say something to you?

A Yes.

Q What did he say?

A "Try to find your mother."

* * *

[312]Q After you talked to Kenneth and he told you to go find your mother, what did you do?

A I went to look for my mother.

Q Where did you go?

A I went around the house. I found her on the ground here. He was chasing her. I was asking him, begging him not to shoot her and everything.

* * *

[313]Q Where did you find your mother?

A Outside.

* * *

Q When you went outside, what did you see?

A Him chasing after my mother.

Q Where was your mother?

A She was trying to stop a car but the car flew by and she couldn't run that fast. All she could do was just stop.

Q Where was she when you saw her stop?

A In the middle of the street.

Q Where was Duane?

* * *

314]A Behind her.

Q Did he have anything in his hands?

A Yes.

Q What did he have in his hands?

A A gun.

* * *

Q What did you see him do with the gun?

A He shot my mom.

Q Did you hear him say anything before he shot your mother?

A Yes, he was talking but I don't remember what he was saying to her. All I remember is jumping on him and begging him not to shoot my mom. My mom was begging for her life too.

Q What was your mom saying?

A "Duane, don't shoot me. Don't shoot me." I was saying the same thing. "Don't [315]shoot my mama." I jumped on his back and was hitting him.

Q How far away was Duane from your mother when your mother was begging him not shoot her?

A Well, I don't know exactly how far but it wasn't far away.

* * *

Q Can you stand down and show the jury how far away your mom was?

A I don't know exactly. I was begging him not to shoot her. All she could do was beg for her life.

Q What was Duane doing?

A Talking mess.

* * *

Q Do you know what he was saying?

A No.

Q Was he talking?

A Yes. "I'm going to shoot you. I'm going [316]to shoot your A." You know what A stands for, don't you?

Q Yes. What was he doing with the gun?

A He was pointing the gun.

Q At some point what did he do with it?

A Shot her.

Q Did he point the gun directly at her?

A Yes.

Q When he shot her, what were you doing?

A Hitting on him. When he shot her, I fell to the ground. I couldn't do nothing. All I could do is go crazy.

Q What did your mother do after she was shot?

A She fell.

Q What happened after you saw that and then you fell and your mom fell?

A I went back in the house to call.

Q Call 911?

A Yes, I did.

Q Did you ever go back outside again?

A Yes.

Q When did you go back outside?

A I went out to see if she was still alive. She was alive and she was telling me that [317]I needed to call the ambulance, to get the ambulance. All I could do was cry and run back inside and call.

Q At some point did you ever see Duane Buck again after he was in the police car?

A Yes, he was in the police car laughing. He thought it was funny and it wasn't.

* * * *

TRANSCRIPT OF PROCEEDINGS, MAY 2, 1997
(MARILYN MURR)

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

* * *

[339]DIRECT EXAMINATION

BY MS. HOOD:

Q Please state your name.

A My name is Marilyn M-a-r-i-l-y-n second word Gay G-a-y last name M-u-r-r.

Q How are you employed, ma'am?

A I'm one of the Assistant Medical Examiners for Harris County Medical Examiner's Office, also known as the County Morgue.

* * *

[344]Q Did you perform an autopsy on Kenneth Ray Butler?

A Yes.

* * *

[346]Q What were the results of your external examination of the body?

A Well, the most significant was the gunshot wound of the front of the chest with the stippling that I mentioned. It was on the left chest.

Q What is stippling?

A Stippling is when the gunpowder from the gun impacts on the skin and causes little scratches that are in a pattern around the gunshot wound.

Q Is stippling present generally from a long-range shot or a short-range shot?

A A short range or what we call a close range gunshot wound.

* * *

|349|Q In regard to your internal examination, could you specifically describe what damage that bullet caused?

A Well, it perforated the heart so there was a hole through the heart. It perforated the lower lobe of the right lung so there was a hole through the lung, and around the gunshot wound track |350|there was hemorrhage and the tissue was ragged looking. Also in the chest cavity there was -- in the heart sac there was three hundred milliliters of blood, and in the chest cavity there was also blood present, one liter, which is about a quart in the chest cavity, and that was from the

heart being perforated and all the blood going into the chest cavity, and the lungs being vascular, they have a lot of vessels so that also bleeds.

* * *

[351]Q Based on the results of your autopsy, do you have an opinion as to the cause of death of Kenneth Butler?

A Yes.

Q What is it?

A Close-range gunshot wound of the chest. Homicide.

* * *

[352]Q I'd like to refer your attention now to Case No. 95-5359. Who is that autopsy report on?

A Debra Lynn Gardner.

Q Who performed that autopsy?

A Dr. Eduardo Bellas.

Q As Custodian of Records, are you competent to testify as to his results?

A Yes.

* * *

[353]Q Did Dr. Bellas also perform an internal examination?

A Yes.

Q What were the results of that?

A The bullet perforated the right lung, the middle lobe of the right lung, and then the diaphragm and then the liver. Then it came to rest in the side in the subcutaneous tissue which is the tissue right under the skin.

* * *

[357]Q Is the description of the injury which you have already described including the path of the missile or bullet consistent hypothetically with someone, with the victim being taller than the shooter, having to be on their knees perhaps and then shooter shooting downwards at an angle?

* * *

A Yes, it is.

Q Based on this Autopsy Report, do you have an opinion as to the cause of death?

A Yes.

Q What is your opinion?

A Gunshot wound of the chest. Homicide.

* * * *

TRANSCRIPT OF PROCEEDINGS, MAY 6, 1997
(VIVIAN JACKSON)

CAUSE NO. 72810

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

DUANE EDWARD BUCK,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

TRIAL CAUSE NO. 699684
APPEAL FROM THE 208TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS
JUDGE DENISE COLLINS, PRESIDING

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* * *

[30]DIRECT EXAMINATION

BY MS. HUFFMAN:

Q Ma'am, would you please introduce yourself to the jury?

A My name is Vivian Jackson.

* * *

[31]Q Ms. Jackson, do you recall approximately when you first met Mr. Buck?

A Yes.

Q When was that?

A About 1985.

Q What was the nature of your relationship with Mr. Buck? What kind of relationship did you have with him?

A An abusive relationship.

[32]Q Was he your boyfriend?

A My boyfriend.

* * *

Q During the time you lived with Mr. Buck, I think you told the jury it was an [33]abusive relationship?

A Yes.

Q Did he ever cause physical harm to you?

A Yes.

* * *

Q Did he ever hit you with his fists?

A Yes.

Q On what part of your body?

A My face, and all over really.

Q At the beginning of the relationship did he beat you initially?

A No, it wasn't often at the beginning.

Q At some point did it get worse?

A Yes.

Q When did that happen?

A About at the end.

Q How often was he assaulting you or [34]beating you during the end part of your relationship?

A Almost every day.

Q Did he ever use a weapon against you?

A Yes.

Q Tell us about that.

A At one incident he put a gun to my throat and another incident he put a gun to my face, but I didn't know if it was loaded or not.

Q You don't know if it was loaded?

A Yes.

Q Did he ever use anything to hit you with other than his hand?

A Yes.

Q What did he beat you with?

A A belt, a coat hanger, and one time he had a cast on his arm and he beat me in the head with it.

Q Did he ever try to burn you?

A He threatened to pour boiling water on me before.

Q During all those years he abused you, did you ever call the police?

A No.

[35]Q Why not?

A Because I was afraid.

Q Did you ever try to leave?

A I left him one time.

Q What happened?

A I went over to my sister's house and he came over and threatened me so I went back.

Q What did he say? How did he threaten you?

A He threatened to hit me if I wouldn't go back so I went back.

Q You said you had an abusive relationship with him. What kind of abuse was it? Was it just physical?

A Physically and mentally and emotionally.

Q How was it that you were finally able to break away from Mr. Buck?

A Well, a friend of mine called my mother and told her what was going on and she came and got me.

* * * *

TRANSCRIPT OF PROCEEDINGS, MAY 6, 1997
(DEPUTY D. R. WARREN)

* * *

[62]DIRECT EXAMINATION

BY MS. HUFFMAN:

Q Sir, please introduce yourself to the jury.

A Deputy D. R. Warren.

* * *

[63]Q Did you have the opportunity to see any of the victims of the murder?

A Yes, ma'am, I did.

Q In particular do you recall seeing the victim by the name of Debra Gardner, a female victim, who was shot in the middle of the street?

A Yes, ma'am.

Q Did you have the opportunity to go up and look at her?

A Yes, ma'am, I stayed with her while she was in the street.

Q What was her condition when you had contact with her during those early morning hours?

A She was doing very bad.

Q What do you mean?

A She had a gunshot wound to her chest and there was a puddle of blood.

Q Did she appear to have problems with her [64]physical condition?

A Yes, ma'am, she was struggling for breath.

Q Did you ever see any of her family members who were around there?

A Yes, ma'am.

Q Who did you see?

A There were three young children, a boy and a girl around there. Then there was a little girl who was three or four. She was running around and crying trying to come over to her mom on the street.

Q She was crying?

A Yes, ma'am.

Q What happened?

A I was the only Deputy on the street so I let her come over.

Q What happened?

A She was very upset but the woman wanted her to be with her so I let her come over. The lady on the street wasn't doing very well.

Q Based on your observations of the woman on the street, what was your opinion about what was going to happen to her?

[65]A She wasn't going to make it.

Q Did the woman on the street make some conversation with the little four-year old girl who came up to her?

A Yes.

Q Did you hear that conversation?

A Yes, she told her she loved her. The little girl was crying and hugging her. She told her it was going to be all right.

Q Then what happened?

A Then I took the little girl away. At that time she passed away.

Q The woman died after she told the little girl that she loved her?

A Yes, ma'am.

Q How did the little girl respond when you took her away? Were you holding her or what?

A I was holding her for awhile, yes.

Q Why were you continuing to hold her?

A Because she wouldn't let me put her down and wouldn't go to anyone else.

* * *

[67]Q When did you first come into contact with Mr. Buck?

A When they told me to transport him to the station.

Q Did you do what you were told?

A Yes, he was placed in my vehicle.

Q While he was in your vehicle, did you look at him and observe his demeanor?

A Yes, ma'am.

Q What was his demeanor at that time?

A He was pretty upbeat and laughing.

Q Did you at any time see any crying or tears on his part?

A No, ma'am, I did not.

Q Did you see him laughing?

A Yes, ma'am, I did.

Q Did you see him talking to any family members?

A Yes, ma'am, I did.

Q Were there other family members who were there around the scene?

A Yes, ma'am, outside of the tape.

* * *

[68]Q What was his demeanor during that trip while he was in the back seat of the patrol car?

A Smiling and laughing.

Q At some point, based on his laughing, did you make a comment?

A Yes, ma'am, I did.

Q What did you say?

A I told him that I didn't think the situation was very funny at all.

Q How were you feeling at that time after what you had been a witness to?

A It was very stressful and sad the way it went down.

* * *

[69]Q What did the defendant say after you made that comment that you didn't think it was funny?

A "The bitch got what she deserved."

Q Did you make any further comment about the fact that you didn't think it was funny?

A Yes, ma'am. I told him that I still didn't think it was a funny situation.

Q What did he say then?

A He said that God had already forgiven him before and that he was going to heaven because he was forgiven.

[70]Q En route to the Police Station, what was his demeanor?

A The same. He was happy, upbeat.

Q During the time that you spent with Mr. Buck that morning, did you ever see him demonstrate any type of tears or remorse for the crime that he had committed?

A No, ma'am.

* * * *

TRANSCRIPT OF PROCEEDINGS, MAY 6, 1997 (DR. WALTER QUIJANO AND CLOSING STATEMENTS)

CAUSE NO. 72810

IN THE COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS

DUANE EDWARD BUCK,

Appellant,

vs.

THE STATE OF TEXAS,

Appellee.

TRIAL CAUSE NO. 699684
APPEAL FROM THE 208TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS
JUDGE DENISE COLLINS, PRESIDING

REPORTER'S RECORD
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[101]WALTER QUIJANO

was called as a witness by the Defense and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. EASTERLING:

Q State your name, please, sir.

A My name is Walter Quijano.

Q Mr. Quijano, where have you been the last hour and a half?

A In another court.

Q So you finished up and then came to visit with us?

A Yes.

Q Give the jury an idea of what kind of work you do, what your credentials are, what your educational history is.

A I have a Bachelors Degree in General Psychology and a Master's and Doctorate Degree also in Clinical Psychology. I have completed all the requirements of the Texas State Board of Examiners of Psychologists to practice psychology in Texas.

[102]My work has been both with the public and private sectors. I was a Consulting Psychologist at the Federal Correctional Institution in San Pedro, California, properly called the Federal Corrections Institution at Terminal Island. From there I did some chemical dependency work as a Staff Psychologist at the then Texas Department of Corrections and now called the Texas Department of Criminal Justice Institutional Division. From there I worked for a State hospital in Oklahoma where I did forensic work and was Chief Psychologist.

Then I returned to the private sector doing chemical dependency work in Oklahoma and then in San Antonio. I then was invited back to the then TDC to become Chief Psychologist and Director of Psychiatric Services. I did that for about four or five years and then I resigned that position and represented the State of Texas in the Special Master Theme that surveyed the compliance of [103]the prison system with Court-ordered stipulations. I did similar work for the Federal Court in Florida.

After that I opened a full-time private practice in Conroe. I do much criminal work. I do evaluations and treatment for both juveniles and adult probations out of Montgomery County District Courts as well as the 258th Judicial District. I do some work for the Texas Rehabilitation Commission doing vocational as

well as disability evaluations. I do some work for DPS. I also have private clients coming from various referral sources.

Q How many years did you work for the Texas Department of Corrections which is the prison system in Texas?

A I did as an employee for five years, and I continued to do some work for them on a case-by-case basis depending Court-ordered evaluations.

Q Were you appointed by Judge Collins of the 208th District Court to do an evaluation on the defendant Duane Edward [104]Buck?

A Yes, I got an order to perform an exam on Mr. Buck.

Q Are you paid by the County to do this work?

A Yes.

Q Have you been appointed in other cases over the years since you've been in private practice?

A Yes.

Q Can you give us a general estimate of how many capital murder cases that you've been appointed to evaluate?

A About seventy.

Q About seventy?

A Yes.

Q Have you also worked for the State of Texas and District Attorney's Offices throughout the State evaluating defendants and testifying in their behalf also?

A Yes.

Q Can you give us an estimate of how many times you've testified for the State of Texas?

[105]A It's running about even. I keep track of that because I get that question real often, so it's about fifty-fifty.

Q Did you do a forensic psychological evaluation and some testing on Duane Edward Buck?

A Yes.

Q Where was that done?

A At the Harris County Jail.

Q Can you tell us some of your behavioral observations first about Mr. Buck?

A He was very cooperative. There was nothing unusual with our conversation or his demeanor during the evaluation. I did not see any thinking disorder or emotional disorder. I saw some poor insight, but overall it was a normal conversation except for the fact that the insight was poor and he had a excessive obsession with the Bible and Jesus and what we call jail house conversion.

Q When you were conversing with him in doing your observations, were you also looking for any symptoms of mental [106]illness or, I guess, insanity or what the lay person would call craziness? Were you looking for things like that?

A Yes, you interview and keep an eye on any thinking disorder, any emotional disorder, and then any personality disorder.

Q You didn't see any of those things?

A No thinking disorder, no significant emotional problems, but I recognized a personality disorder.

Q Let's talk about that.

Q What did you recognize?

A He has what is called a dependent personality disorder.

Q Would you explain that?

A A person with a dependent personality disorder is one who in one sense is selective in their relationships that they develop, but once they develop the relationship, they hang on to it even when the relationship is over. It is difficult for them to disengage and they will do extraordinary things to hang on to the relationship. These individuals [107]can become very extreme in wanting to maintain that relationship and sometimes go to the point of thinking if I cannot have you, nobody else can.

Q You developed a history of his relationship with, for lack of a better word, his common-law wife Vivian Jackson, where he had a child; is that correct?

A Yes.

Q Were you also aware of the relationship that he had with the deceased in this case, Debra Gardner?

A Yes.

Q Of course, you were provided the facts from the police report and from me concerning how the murder occurred on Puerta Vallarta, correct?

A Yes.

Q So all of this evaluation and the symptoms you saw, all of that was developed from your evaluations as well as the facts of this capital murder, correct?

A Yes.

[108]Q He showed no signs of insanity to you; is that correct?

A No, not in the legal sense.

Q Now, the defendant's personality disorder that you've described, is that an Axis I disorder?

A It is an Axis II disorder.

Q For the jury's information, what is Axis I and what is Axis II?

A Axis I is a psychological problem that is the object of study or object of treatment. So you would have schizophrenia, depression, substance abuse. Those are objects of study or treatment.

Axis II is a personality style or personality disorder of a person that would interact with Axis I. Many times you treat Axis I disorder and the treatment doesn't work. Chances are there's a personality defect that's interfering with your treatment and you have to address the Axis II disorder first.

Q On your Clinical Impressions on Page 6 [109]of your report, what's the Axis I diagnosis that you have?

A The Axis I was alcohol dependence which was in remission because he was in jail, cocaine dependence which was in remission because he was in jail, but those were the Axis I impressions.

Q Are you familiar with the capital murder punishment issues that jurors are given in a capital murder case at the punishment phase?

A Yes.

Q The first that the issue has to decide is whether the State has proven beyond a reasonable doubt that there's a probability that the defendant would engage in future acts of violence which would constitute a continuing threat to society.

You're familiar with that issue, aren't you?

A Yes.

Q I want to talk about that with you for a moment. I'm going to ask your professional opinion regarding Mr. Buck [110]in relation to that issue.

If we have an inmate such as Mr. Buck who is sentenced to life in prison, what are some of the factors, statistical factors or environmental

factors that you've looked at in regard to this case?

A Number one, among the statistical factors we know to predict future dangerousness is the fact of the crimes. You have to look to see if the person has in the past been assaultive or aggressive, chances are he will be in the future.

Age, the younger the person, the more aggressive and violent a person is. The older a person is, over the age of thirty or in the thirties, the assaultiveness decreases to the point whereby age fifty years old, there's less than one percent of violent acts committed by senior citizens.

Sex. The male for some strange reason is more violent than a female and more assaultive.

[111]Race. It's a sad commentary that minorities, Hispanics and black people, are over represented in the Criminal Justice System.

Social-Economics. The poorer the person, the more likely they are to be violent. There is less violence in the upper social economic levels. The more stable the employment, the less violent the person is.

Substance abuse. The more substance abuse there is, the more violent a person is.

Those are the statistical factors in deciding whether a person will or will not constitute a continuing danger.

Q If you have a defendant such as Duane Edward Buck that has no prior violent offenses, is it true that there would be less of a probability that he's going to be dangerous or commit acts of violence in the future?

A True.

Q Let's talk about environmental factors [112]if he's incarcerated in prison. Let's talk about things such as the availability of victims and things like that. Explain that in terms of probability to the jury.

A The availability of victims means the broadness or narrowness of the victim pool. If the victim is randomly selected, then the more dangerous the person is because there is no predictability as to who the next victim is. The narrower the victim pool, the less dangerous the person will be in the future.

In this particular case the victim is not random, it's narrow, and there is a pre-existing relationship. It was, for lack of a better term, a husband and wife difficulty that is unlikely to be repeated. In prison there is, of course, a narrow victim pool. A sex relationship that this person

is prone to have will not be pleasant in prison. There will not be wives or girlfriends In prison.

[113]There are other potential victims in prison like other inmates, civilian staff, male and female guards, nurses, teachers and so forth. Those are potential victims, but in this particular case the probability of developing a dependent relationship with them would be very small, and those potential victims in prison are more alert to the danger and are less likely to be victimized than in free society where the victims are just victims of crime.

Q You were also provided with some data or some history on Mr. Buck in relation to how he reacts in custody. Isn't it true that the records from the County Jail as well as from the prison system --

MS. HUFFMAN: I would object. He's asking for this witness to testify from hearsay.

MR. EASTERLING: That's what he's expected to do. They evaluate reports and form opinions. It's an exception to [114]the hearsay rule.

THE COURT: Lay your groundwork.

BY MR. EASTERLING:

Q You have been provided data and some records and information on Duane Buck's behavior while he was in the jail and in prison; is that correct?

A Yes.

Q When you looked at that information and talked with me about the information, you determined whether or not he had had any disciplinary problems, didn't you?

A Yes.

Q And he hasn't had any disciplinary problems in the County Jail or in the Texas Prison System; isn't that correct?

MS. HUFFMAN: I'd object to the hearsay.

THE COURT: Sustained.

BY MR. EASTERLING:

Q You used some data to determine whether or not he would be a threat from his [115]behavior in prison, correct?

A Yes.

Q What did you determine that from?

A From the disciplinary records he has no assaultive incidents either at TDC or in jail.

Q What does that tell you?

A Number one, that's a good sign that this person is controllable within a jail or prison setting. He has demonstrated that to be so. Some people do well from an open environment and some people do well in a restricted environment. This person seems to have adjusted to the structures of the prison and has shown himself to be not assaultive there.

Q So if Duane Buck was sentenced to life in prison, do you have an opinion about whether there's a probability that he would commit criminal acts of violence that would be a continuing threat to society?

A The probability of that happening in prison would be low.

Q Let's talk about whether or not there's [116]any differences in your research between someone who does a small or short prison sentence compared with one who is sentenced to life in prison. Are there any differences?

A Short-termers are more disorderly than long-termers. People who are serving shorter sentences are more rebellious. They create trouble in the prison system, mischief, fighting. The long-term prisoners or life-termers constitute a good subsection of the prison system. They, in the words of the correctional people, know how to do time.

Q Is there a disciplinary system within the prison system that effectively controls inmates?

A Yes.

Q Would you briefly describe that to the jury?

A There are two or maybe three systems. The informal system is there's always somebody bigger than you.

The second system is one that we [117]call a court. The court is a disciplinary committee inside the prison system made up of officers and other prison employees.

There is a third system that is used if they commit felonies inside the prison. There is a special prosecution inside the prison system that prosecutes felonies committed in the prison.

MR. EASTERLING: May I approach the witness, Your Honor?

THE COURT: Yes, sir.

BY MR. EASTERLING:

Q Let me show you what's been marked Defense Exhibit No. 1, Mr. Quijano. I'd ask you if you recognize that?

A Yes.

Q What is that?

A It's a copy of my psychological evaluation of the defendant.

Q The defendant in this case?

A In this case.

Q Is it a true and accurate copy of your [118]findings and your report on Duane Edward Buck?

A Yes.

MR. EASTERLING: I'd tender the exhibit to State's Counsel and ask that it be admitted in evidence.

MS. HUFFMAN: Your Honor, I would object to this as being hearsay.

THE COURT: Approach the bench.

(The following proceedings are held at the bench outside the hearing of the jury.)

MR. EASTERLING: This is not hearsay, Your Honor. It's his work.

THE COURT: I've never even seen it.

MR. GUERINOT: If her objection is hearsay, she's [119]right. We need to prove up the predicate for business records and then reoffer it and then see what she has to say.

MS. HUFFMAN: I'd like to look at it. I need to read it.

(The following proceedings are held in the hearing of the jury.)

THE COURT: I've sustained your objection.

BY MR. EASTERLING:

Q Dr. Quijano, who prepared this report?

A I did.

Q What time did you do so?

A I completed the report on March the 8th of 1997.

Q Did you make the entries in this report from your own personal knowledge?

A Yes.

Q Are you the custodian of these records?

A Yes.

[120]Q Have you kept these records in your possession since you made the entries?

A Yes.

Q Were the entries made at or near the time or immediately following your evaluation of Duane Edward Buck?

A Yes.

Q Have there been any changes or deletions or alterations from your original personal report that you brought in your briefcase today?

A No.

MR. EASTERLING: I'd make the same offer, Your Honor.

MS. HUFFMAN: He's offering a document I've never seen before.

THE COURT: Ladies and gentlemen, I'm going to send you to lunch. The Deputy is going to take you to lunch.

Remember you cannot discuss anything about the case at all. Does everyone understand that? You're excused

* * *

[145]explain or support the expert's opinion or inference, the Court shall exclude the underlying facts or data if the danger that they will be used for an improper purpose outweighs their value as explanation or support for the expert's opinion.

I make that finding that admitting them would outweigh any probative value they may have as explanation or support of the expert's opinion.

MR. GUERINOT: And we would object to that most respectfully.

THE COURT: Bring the jury out.

(The following proceedings were had in the presence of the jury.)

MR. EASTERLING: I'll pass the witness, Your Honor.

[146]CROSS-EXAMINATION

BY MS. HUFFMAN:

Q Sir, how are you today?

A Fine, thank you.

Q Dr. Quijano, you've testified here in Harris County before, have you not?

A Yes.

Q And in this case you're being paid for your testimony; is that correct?

A Yes.

Q In fact, right before you testified in this case you were testifying for the Defense in a serial rape case down the hall; is that correct?

A Not serial rape.

Q What kind of case was it?

A A rape case.

Q How much are you being paid for your testimony today?

A I'm not paid for my testimony. I'm paid for my time.

Q How much are you being paid for your time?

A I charge one hundred fifty.

Q Dollars?

|147|A Dollars.

Q For what?

A Per hour.

Q Approximately how many hours have you got up to this point at almost 3:00 o'clock in this case?

A It's been since 12:00 o'clock.

Q So prior to your testimony here today, you have previous time in this case?

A Yes, the evaluation.

Q When did that evaluation occur?

A The actual interview was February 14, 1997, and I finished writing the report on March 8th.

Q How many times did you meet with the defendant Duane Buck?

A Just one time.

Q What was the time period you spent with the defendant?

A How long I spent with him?

Q Yes.

A Two and a half hours.

Q So all your conclusions and all the opinions that you have given to this jury are based on a two and a half-hour [148]interview with the defendant; is that true?

A Some testing and some eyewitness statements.

Q So you have reviewed some eyewitness reports given to you by Mr. Guerinot?

A Mr. Easterling.

Q And then you interviewed the defendant?

A Yes.

Q Did you interview him in the Harris County Jail?

A Yes.

Q What type of facilities did you interview him in? What type of room was it?

A It's a booth with Plexiglas between us and a small speaker screen.

Q It's kind of like a closet, isn't it?

A Yes.

Q You're surrounded by concrete and it's real loud in there?

A Yes.

Q It's difficult to hear who you're conversing with; is that correct?

A Yes.

[149]Q Would you say it's probably the worst situation or circumstances in which to conduct a clinical interview?

A Yes. I prefer the old jail.

Q But in the new jail that's the way it's set up?

A Yes.

Q The information that you used to complete your report and to give your opinion to this jury is based a lot on your interview with the defendant; is that correct?

A Yes.

Q Now, you testified that you administered some tests to him. Did I hear you say that?

A Yes.

Q What type of tests did you administer to him?

A It's called the Millon Clinical Multiaxial Inventory Two.

Q Inventory Tool?

A Two, number two.

Q What is the purpose of that test?

What's the objective?

[150]A This test is for mainly to measure the different personality styles. That's its most useful use. It can also give some indication of major psychiatric disorders and substance abuse, but it's primary tool is to determine or help determine personality style, personality disorder.

Q The manner in which the test is administered, are you asking him questions and he responds verbally, or does he have to write something?

A He has to answer true or false so it's a paper and pencil test.

Q So the test is purely self-supporting in that whatever he tells you, that's what you go with?

A That's correct. True.

Q There's no way to back up what he says? You don't interview other people or other witnesses to verify what he has told you; is that correct?

A Once the results are in and it gives you some impressions, you have to judge that against the clinical interview and [151]historical background to see if it makes sense. Then you either accept the test or reject the test.

Q So you make a judgment call in that regard?

A Yes.

Q Do you have a copy of that test with you?

A Yes.

Q May I see it, please?

A Yes.

Q Dr. Quijano, just to give the jury an idea what kind of questions that they're asked, I'd like to go through some of this.

Is this a common question? "I always follow my own ideas rather than doing what others expect of me." True or false.

Is that one of the questions?

A Yes.

Q "I always feel like I'm not wanted in a group."

Is that a question?

A Yes.

[152]Q "I enjoy doing so many different things that I can't make up my mind what to do first."

A That's also a question.

Q "I think I'm a very social and outgoing person."

Is that a question that you ask?

A Yes.

Q "I have a talent to be dramatic."

A Yes.

Q "I think I'm a special person which deserves special attention from others."

These are some of the questions that you said you asked?

A Yes.

Q "I was on the front cover of several magazines last year."

A Yes.

Q "I feel very often that I lose my ability to feel any sensation in parts of my body."

A Yes.

Q "I use my charm to get the attention of other people."

Is that a question?

[153]A Yes.

Q "For some time now I've been feeling very guilty because I can't do things right anymore."

Is that a question?

A Yes.

Q "Many people have been prying in my private life for a year."

Is that a question?

A Yes.

Q "I often get angry with people that do things slowly."

A Yes.

Q These are pretty much the nature of the questions that you go through with them? I see there are a hundred and seventy-five of those questions; is that correct, sir?

A Yes.

Q After you've gone through about a hundred and seventy-five of those general type of questions, do you often feel you have a pretty good handle on the person, or enough of a handle on the person to make the type of diagnosis [154]that you have made?

A It gives you some tips or ideas as to the direction to go in and then you confirm with your clinical data.

Q Your clinical data being what?

A Interviews, histories, eyewitness statements.

Q Of course, that all comes within the time period that you've told the jury that you have spent on the case?

A Yes.

Q And that's based on a synopsis from the Defense about their version of the facts of the case; is that correct?

A Yes.

Q Are you aware of any determination by the American Psychological Association where they have determined that it is unethical for a

psychiatrist to testify in a capital murder case about the future dangerousness of the defendant?

A No, that's not true.

Q You disagree with that?

A That is not true. The American Psychological Association does not [155]control psychiatrists. That statement is by the American Psychiatric Association.

Q Here's what I asked you. I said the American Psychiatric Association. That is my question.

A If that is your question, then it is true that the American Psychiatric Association has made that statement. The American Psychological Association has not made that statement.

Q That's not the question I asked but thank you for clarifying that.

MR. EASTERLING: Excuse me, Judge, but the record will show that she did say the American Psychological Association. Probably wasn't intentional but that's how she asked the question.

Q In any event, sir, let's move on. I'd like to ask you some questions from your report that I've had a chance to look over during the lunch hour.

You and I have never spoken [156]before you came in to testify today; is that correct?

A No, we haven't.

Q In fact, is it true that the State of Texas didn't know in advance that a Defense expert was going to testify one way or another in this prosecution; is that correct?

A I don't know. Sometimes they know and sometimes they don't because I get calls from prosecutors sometimes before I testify.

Q In this case you and I have not spoken?

A No, we haven't.

Q I have a few questions about your report that I would ask you to explain to me, if you don't mind. You made the comment that the defendant appeared to be of questionable reliability as an informant.

Was that based upon your general impression of the defendant or on something that didn't pan out from his test as opposed to what you knew about the facts of the case?

[157]A It was just the way he described his situation to me. Some of his version did not make sense.

Q So you had some questions about that?

A Yes.

Q You also mentioned that through the administration of the tests that it appeared that he had magnified the level of experienced illness. What does that mean?

A In that test we discussed in some of the questions that you read, there is a mechanism built into the test to measure the degree in which the respondent either pulls too much appearing too sick or pulls too much to feeling too well, too healthy. So on one side you have exaggeration and on the other side you have minimization. This particular respondent showed some exaggeration of symptoms.

Q Of course, at the time the defendant is speaking with you in the jail setting, he knows because you've informed him that you're interviewing him for [158]purposes of making a determination about your opinion as to his future dangerousness; is that correct?

A Yes.

Q Certainly the defendant knows that at some point in the future he's going to go to trial, right?

A Yes.

Q And at some point you're going to testify before a jury about your opinion, correct?

A Yes.

Q Is that a fair statement?

A Yes.

Q Looking at your report regarding the future dangerousness issue and the statistical factors including when you analyzed his past crimes, I believe you stated that this was non-contributory, correct?

A Yes.

Q I believe or I'm assuming you testified to that because you thought all of his past offenses were non-violent, correct?

A True.

|159|Q Is that based on self-reporting and maybe a synopsis of the Defense's notes?

A Mostly self-reporting.

Q If you were informed that the defendant in fact had a history of abuse towards women and had been assaultive and combative and had threatened women with weapons before, would

that alter that factor under this statistical factor category?

A Yes.

Q So would that increase the probability then of future dangerousness if that were a factor that you would consider?

A That would increase the probability with that population of victims, yes.

Q Now, you also mentioned that it was your opinion that as a person becomes older that they are less likely to commit violent crimes. Is that true?

A Yes.

Q Isn't it true that even though it may be less likely that it is a fact that people of a greater age than thirty-three do in fact commit extremely [160]violent crimes?

A Yes.

Q So you can't rule that possibility out that an older defendant would commit violent crimes, correct?

A No, we are talking about decreasing probability and not impossibility.

Q You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?

A Yes.

Q Now, as far as the socioeconomic factor, I believe you said that the report of his working stability was self-reporting?

A Yes.

Q Which decreased the probability, correct?

A Yes.

Q What if you had information that in fact that the defendant wasn't a steady [161]worker, that he worked for someone who paid him in cash, that he worked only sporadically. Would that increase the probability more so than you initially stated in your report?

A The second sentence says unstable by witness report because one of the witness' statement said that he refused to work.

Q So that increases it?

A Yes.

Q Let's talk about environmental factors. In your report you talked about the availability of victims, that the victim pools become smaller in a prison situation.

A Yes.

Q Would you agree with me though that in fact there are victims available in the prison population?

A Yes.

Q Without a doubt that there are crimes that occur in the prison population, correct?

A Yes.

[162]Q You worked in TDC yourself for several years, correct?

A Yes.

Q Certainly you've been aware of instances where an inmate was killed by another inmate, correct?

A Yes.

Q And incidents of guards being killed by inmates?

A Very, very seldom, but it has happened.

Q Other people who are in the prison system for various reasons have been killed before; is that true?

A Yes.

Q So you can't tell this jury that violent crimes do not happen in prison because in reality it does occur, correct?

A I'm not telling the jury that it doesn't.

Q Also you mentioned earlier that there is a prosecution --

A Unit.

Q Thank you very much. That a prosecution unit is set up to prosecute people who commit crimes in prison. Of course, [163]what happens is that when they are prosecuted and found guilty and are punished, they're sent back to prison, right?

A Or remain in prison.

Q That's what happens. They're in prison and they commit a crime and they're prosecuted and they go back to prison, right?

A Yes.

Q Let's talk about the factor of availability of weapons which is also one of the factors that you say would increase probability. Is it true that weapons are available in prison?

A Yes.

Q Have you had occasion during your time working in the prison system to see an almost incredible variety of weapons that can be fashioned by inmates in prison?

A Yes.

Q In fact, they're almost ingenious in what they can come up with and what they can use to make a deadly weapon; is that [164]not true?

A Yes.

Q They can use toothbrushes, toothpicks, and fashion all kinds of things that they use to injure, assault, or maim other people; is that correct?

A Yes.

Q Let's talk a little bit about drugs and alcohol in prison. You have that as an increased probability and that's because, unfortunately, there are drugs available in the Texas Department of Corrections, correct?

A Yes.

Q And it is a known fact, however it gets in there, that there is a network of all kinds of illegal and illicit substances in the Texas Department of Corrections, correct?

A Yes.

Q You talked about clinical factors that you consider when you make the assessment of a continuing threat and the dangerousness issue. You could not give an opinion basically because of [165]insufficient data from the defendant's self-reporting; is that correct?

A From his version, not sufficient data. From the eyewitnesses, it appeared deliberate.

Q So the more information you would know about the time period, the thoughtfulness the defendant put into committing his crime, or let's just call it the premeditation factor for lack of a better word, that went into it, the number of intentional acts it took to perpetrate his crime, all those are important factors to consider when determining the probability for future dangerousness, correct?

A Yes.

Q So the more deliberate the act, the more thought that went into the act, the more awareness of the

result of a person's act, the less impulsive the act, the more likely the person would be a danger and violent in the future?

A Yes.

Q Would that be a fair statement?

[166]A Yes.

Q The lack of remorse, the fact that a person showed very little or absolutely no remorse for the results of his action even for an extremely violent act, would that show that that person has a greater likelihood of being a threat in the future?

A Yes.

Q Talking about post-conduct behavior, things he did after he committed the crime, you have a category called fun. I don't know if that's a standard category or whether it applies in this case or not. I'm not sure. You made a notation about the fact that you had information that the defendant was laughing. If you had information that the person thought it was quite humorous, the crime that he committed, which was an extremely violent and heinous act, and even after seeing the result of his handiwork with people bleeding, people screaming, children crying, children running over to their [167]mother and hugging her before she died, would that indicate

to you that that person with no remorse would have a greater probability of being a danger in the future?

A Yes.

Q In your report you indicated, and I believe you testified to the jury that you believed that the defendant if incarcerated would not -- there would not be the probability about him being a continuing threat to society. I believe that was your opinion.

A No.

Q That was not your opinion?

A A decreased probability but there is a probability.

Q So there's a probability that the defendant would be a continuing threat to society?

A Right, but he would be on the low end of the continuum. I never rule out any probability.

Q Then there is a probability that he would be a continuing threat to society?

[168]A Yes.

MS. HUFFMAN: No other questions, Doctor. Pass the witness.

REDIRECT EXAMINATION

BY MR. EASTERLING:

Q First of all let's make it clear whether or not you're a psychologist or a psychiatrist and what the difference is so the jury understands. Are you a psychiatrist?

A I'm a psychologist.

Q Tell the jury what the difference is between an psychologist and a psychiatrist.

A About two hundred dollars an hour.

A psychiatrist is a medical doctor. They go to medical school. The last three years they have to specialize and they are trained in psychiatry which is the medical diagnosis and treatment of psychiatric disorders. A psychologist undergoes approximately the same number of years in training but |169|specializes in psychology and does not use medication to treat but uses established psychological principles and not medical intervention.

Q So it's the medical doctors, the psychiatrists from the American Psychiatric Association that don't believe in coming in and testifying in death penalty cases?

A I don't think it's that simplistic. It simply says that you have to examine the person and know the basis of your prediction and that it's not enough to predict. You have to also explain the basis for that prediction so that the trier of facts can give the appropriate weight to your opinion.

Q But the American Psychological Association has never taken the position that there's something wrong with you coming in here and testifying, have they?

A No. The American Psychological Association's guidance is to use existing knowledge, psychological [170]knowledge, the body of knowledge that we have, and apply to the specific questions. It warns us not to exaggerate our opinions or overclaim. That's why I'm very careful to state my opinions in terms of probabilities and not black and white type of assessment.

Q If I would have asked you to do this evaluation and you would have given me the opinion that he was going to be a high risk or there was a high probability, then that would have been the opinion we all would have had to live with, right?

A Correct, because it would have been based on the facts of the case.

Q You didn't give your opinion to me because I wanted you to give that opinion or Mr. Buck

wanted you to give that opinion or Mr. Guerinot wanted you to give that opinion. You gave us your professional experienced opinion; is that correct?

A Correct. Nobody interfered with my opinion nor lobbied me. I wrote my [171]report and I submitted it the way it is.

Q What is the I.Q. of Duane Buck that you know from your testing?

A I did not do the testing myself but the tests from some other psychologist shows 74, I think.

Q Could it be 72 to 74?

MS. HUFFMAN: I'd object to the leading, Your Honor.

THE COURT: Sustained.

BY MR. EASTERLING:

Q If it was around 74, is that on the low or high end of I.Q.?

A That would be what is called the low end of the borderline range.

Q Do you feel that had some effect on what Ms. Huffman pointed out, that he was a questionable informant about information and details?

A That opinion came from his report to me that he could not remember details up to a certain point and that is where I said that his reliability is questionable, the lack of recollection of details [172]after a certain point.

Q You then used facts that you learned from the police report and the witnesses' statements about the details of the murders, correct?

A Yes. The witnesses' statements were detailed enough to pick up where he left off. It was very beneficial for me to read that and to make a judgment in this case, and the witnesses' statements were responsible for many of the favorable judgments I made of this defendant.

Q Now, you were aware that there was some history of some alleged assaultive behavior to a woman. You were aware of that. You are still aware of it today.

Does that change your opinion in any way concerning the fact that he's at the low end of probability of committing future acts of violence?

A No, my opinion would be the same. Many of these factors that are true to him now would not be true in prison. When you're deciding on a person's dangerousness, you not only look at the [173]factors that contribute to dangerousness but you also look at where the people will be and

the facts of that environment. You look at those factors and know that many of those factors will be controlled in prison. They cannot be ruled out completely but they are controlled much better in prison than in free society.

Q It's very unlikely that he would have a relationship with a woman in the penitentiary; is that true?

A That would be unlikely.

Q And that would reduce the victim pool that you talked about, correct?

A Correct. Particularly in his case where the assaulted victims were always involved in a romantic relationship. When that victim pool is removed, the probability of him being assaultive towards other people as shown by his previous prison record would be expected to be good.

MR. EASTERLING: May I approach the witness, Your [174]Honor?

THE COURT: Yes, sir.

BY MR. EASTERLING:

Q You talked about weapons with Ms. Huffman, about weapons in prison. Do inmates walk around with .22 rifles in prison?

A No, they are no guns in prison.

Q Do they walk around with .12 gauge shotguns in prison?

A No.

Q The kinds of things she's talking about is like an inmate getting a fork from the cafeteria and filing it down and making it into a little knife. That's the kind of thing she's talking about, correct?

A There are no more forks, so it's toothbrushes and pens and bones. There are no more forks.

Q Does Duane Buck have any history of using a knife or that type of deadly weapon with anybody?

A No, not when he was in prison and in [175]jail.

Q In fact, there is no data or record indicating that Duane Buck has ever used a knife or a toothbrush or a razor blade all the time that he was in the County Jail or in TDC, correct?

A True.

Q Ms. Huffman talked to you about there being no remorse immediately after the crime. Let me talk to you about your opinion about that. If the defendant cried in open court when the witnesses were testifying, do you have an opinion about whether or not that's remorse?

A Yes.

Q What is that?

A It's remorse.

Q That, of course, would decrease probability under all the facts that you talked about concerning future violence?

A Yes.

Q To make sure that the jury understands, you're saying that it's at the very low end of probability that he would commit any criminal acts of violence in the [176]prison population where he would be incarcerated; is that correct?

A Yes.

Q You realize that the issue they have to decide, the jury has to decide, is the phrase beyond a reasonable doubt in front of probability in that issue, correct?

A Yes.

MR. EASTERLING: Pass the witness, Judge.

MS. HUFFMAN: No questions.

(At this time the witness is excused from the courtroom.)

* * *

[239]right to proceed first and last.

ARGUMENT ON BEHALF OF THE STATE

BY MS. HOOD:

Ladies and gentlemen of the jury, you've heard a lot of evidence in the second phase of the trial. My job at this point in time is to explain what some of that evidence means. Then I'm going to sit down and Mr. Easterling will address you, and then Ms. Huffman and Mr. Guerinot will address you.

I want to talk with you right now about these documents that have been admitted in evidence through the fingerprint person that was here today, Deputy Schield. You're welcome to take any and all of this back into the jury room with you. I just want to touch upon some of the things we think are important.

State's No. 66 is a Penitentiary Packet that is a record of this defendant's trips to the Texas Department of Criminal Justice. It's [240]been proven up to you, but there is a photograph in here and his fingerprints are in here. Most importantly, it reflects two Judgments that were issued against him. You can take a look at this if you care to, but I'm going to tell you briefly what these documents say.

In Cause No. 555487 there is a Judgment for a delivery of cocaine case where he received ten years in the Texas Department of Criminal Justice. What also is important regarding that conviction -- what I'd like to do is refer to State's No. 70 which is being marked for demonstrative purposes only. It's not in evidence. It's not being admitted. It's a record of what we have here on the table. Let's look at this first. What you have in that file is a Judgment and Sentence for carrying a weapon, an unlawful carrying of a weapon case. The offense was committed March 1, 1989. The date on the Judgment is March 16, 1989. He received four [241]days in the Harris County Jail and a fine.

You will note that soon after there was a possession of a controlled substance case. The date the offense was committed was March 25, 1989, and on March 27, two days after that, he appeared in court and received four years deferred adjudication-type probation for that offense.

You will notice that after he received his deferred adjudication probation that he committed an offense. That happened on October 9, 1989, failure to identify himself to a police officer. For that offense, on November 3rd, 1989, he received thirty days in jail. However, go back to the line ahead of it and you will see that at that time he was adjudicated, taken off of the probation that

he received, and on November 1, 1989, he received three years in the Texas Department of Criminal Justice.

If you look forward and go down [242]to the bottom line and see the delivery of controlled substance case. He committed that offense on February 12, 1989, and on February 27, 1990 that he received ten years in the Texas Department of Criminal Justice.

State's No. 70 is for demonstration purposes only and is a summary of what these documents show. You're welcome to look at this and what it shows in summation.

State's No. 68 is a Judgement and Sentence in the failure to stop and identify to a police officer. State's No. 67 is a Judgement and Sentence for carrying a weapon case.

Also in evidence, you're welcome to take a look at them, State's Exhibits 59, 60, 61, 62, 63, and 65. You'll recall from the testimony that these are exact duplicates of jail cards, the booking records of the defendant. It will give you a little bit more information regarding this defendant and all the times that he appeared in court.

[243]What we're asking you to do is take a look at these documents, if you care to. You certainly can take them into consideration when you're doing your deliberations in this case. Thank you.

ARGUMENT ON BEHALF OF THE DEFENSE

BY MR. EASTERLING:

May it please the Court, Your Honor, ladies and gentlemen of the jury, the State, family members, all parties involved in this case.

You are going to have to make the most important decision that you've ever had to make in your life. I'll be right up front with you. I am asking you to spare this man's life. The State is going to ask you the opposite. Ya'll knew this was coming and now you've got to make the decision.

I am asking you to spare his life based on the evidence and not upon sympathy or not upon any other emotions [244]that are generated in these kinds of cases but only on the evidence.

You will remember that we talked to each one of you and you said that you would be fair. You said that you would be open-minded. You said that you would answer these issues according to the evidence and whether they were proven to you, and particularly No. 1, that issue which I'm going to be talking to you about. If they were not proven to you, you would do what the law requires you to do. If they don't prove the case by evidence, you've got to answer the issues accordingly.

There's no doubt about it. Everybody in this courtroom feels bad about what happened. Everybody knows it's a tragedy. There were some lives lost and some lives changed forever. Children have been changed forever. There's no disputing that. I don't apologize for Mr. Buck's behavior because it was bad. There's no question about it, but does it fit into the [245]special category where he should be killed by the State of Texas?

The answer from the evidence is no for the following reasons: You've got to look at everything. You've got to keep this big picture in your mind here. We know that the first issue is about trying to determine whether they have proven beyond a reasonable doubt -- the highest burden that we have in this country -- that there is a probability that Mr. Buck will commit future acts of violence that are a continuing threat to society.

Remember it's a plural. It's acts. It's not one act. It's acts, plural acts of violence, and that he is a continuing threat to society. It's not a particular threat but a continuing threat to society.

Have they proven that? The answer is no. They just haven't met their burden of proof. Anybody can say it's possible that something may happen but we can't predict the future. Sure [246]it's possible that in prison Duane Buck may push somebody else. Sure it's possible that in prison

that he may punch another inmate. Sure it's possible that he might get -- what was it they described? They don't have any forks anymore, but let's say he gets something and sharpens it into a weapon and shanks somebody with it. Sure it's possible, but what do we know from the evidence? That it probably will not happen.

Why will it probably not happen? You can look at this and see all of the months and years that he's been in the County Jails and in the prison system and you will not see one single incident of disciplinary problems. Not even cussing a guard is in evidence. Does that tell you something? Of course it tells you something. It tells you that he's controllable in the prison population.

Living in a cage with no freedom, with no say so about where [247]you're going, somebody else telling you what to do, what you're going to eat, when you're going to eat, not ever getting to walk with his kids in the park, not ever getting to do anything outside the walls of the prison barbed wire or brick, that's punishment. Each one of you told us that a life sentence is punishment.

What this tells us about Duane Buck is that he is a common criminal. There is not one single thing in here indicating violence. He was carrying a weapon. I would submit that half the people in Houston do that.

And then he had a possession of drugs, and he didn't tell his right name to a police officer. Is that violence? Of course not.

Possessing drugs, is that violence? Of course not.

Selling a small amount of drugs to an officer, is that a small-time criminal or is that a vicious and violent criminal? He's a small-time [248]street criminal.

Duane Buck can work on tractors in prison. He can make license plates. He can give something back when he's in a structured, protected society where there is no probability that he is going to harm anybody. We know that from his past record. We know that from his character evidence. We know that from his family members and other people who said they were shocked when this happened. We had no idea he was capable of something so horrible. It was a one-time aberration. It was violent. There was no doubt about it, but it's one isolated event in almost thirty-four years of this man's life. That's what they're asking you to answer these questions on in such a way that he would be executed.

What else do we know? They didn't bring in one single police officer out of all these incidents to come in here and say Duane Buck is a bad person, that he was rough with me, that [249]he gave me a lot of problems, that he spit on me, that he

kicked me. There was not one, not one single one. You can imagine all the police that they could have called, all the prison guards, all the Deputy Sheriffs that they have at their disposal to talk to. Believe me, if they could find something, they would have brought them in. That's something you have to look at.

The only person that they brought in was Vivian Jackson. The results of the evidence about the dependent personality disorder that the two experts described, that is, that he can't stand rejection and he's had a bad time with his relationships when they end because he can't let go. We know that. We know that was the setting of what happened out there.

The State can't deny that this case began out of jealousy, that it began out of passion and emotion. He did horrible acts because of it, but [250]they can't deny the fact that he was agitated and the events were clearly provoked and made worse by the atmosphere with everybody talking trash to each other and pulling knives. Debra Gardner pulled a knife on him. I'm not trying to excuse his behavior. I'm not trying to say that, but it is an explanation for his behavior. That's what you have to look at when you're considering these issues. This was a bad family situation that developed and it turned into a tragedy.

I'm sure Ms. Huffman is going to go through these seventeen deliberate steps. He did take these deliberate steps to commit the crime. Nobody's denying that, but he did it all within a short period of time while he was under the influence of this extreme jealous passion that he had. It's never going to happen again, an act of violence is never going to happen that's anywhere close to this, and it's not even probable that he's going to hurt anybody [251]again.

This man will be thirty-four years old in July, a couple of months from now. He's going into prison as a life sentence and he's going to do his time and not bother people. He's going to be punished for it. He'll be suffering. Of course he will be. It's not a country club. It's a cage. It's iron bars. It's handcuffs.

On this issue we brought you two very professional people that were appointed by the Honorable Judge Collins. That's provided for a reason. That's to level the playing field. That's to make it a fair trial. That's to assure due process. You heard from these experts who deal with these people day in and day out over the years. Dr. Quijano testified he worked for the prison system for five years and he's done this kind of thing for years. What is his opinion? He said that there is a very low probability that he would ever commit an act of violence.

[252]That's an expert opinion and you don't have to take it alone to decide this issue. It's just another piece of evidence that shows you that the State hasn't proven it beyond a reasonable doubt. Dr. Quijano is a credible witness and nothing they could do would discredit him.

Dr. Patrick Lawrence is also extremely qualified and very experienced. He has seen thousands of murderers and tells you that no way does Mr. Buck fit the psychopathic murder profile. In his opinion there is also no probability that he would commit criminal acts of violence in the future.

You can't say that you're going to guess that he's going to do it or that he might do it or he possibly could do it in answering this issue. You can't do that. That's not the law. Judge Collins has told you that you are not to be swayed by sentiment, conjecture, sympathy, prejudice, public opinion or public feelings in answering [253]Issue Number One. You answer it based on the evidence, and I would submit that the State hasn't proven it beyond a reasonable doubt. They haven't tipped the scale far enough. The answer under the law and the evidence to Issue Number One is no.

There is another thing I'd like to talk about. With all the resources of the State, they have the right to call in their own experts to come in and say bad things about Duane Buck. They could have called people up here to say that in their opinion

he would commit criminal acts of violence in the future but they didn't do that. It is significant that they didn't do that. You can deduct from this that --

MS. HUFFMAN: I'd object to them making a deduction from something that's not in evidence.

BY MR. EASTERLING:

You can make a reasonable [254]deduction why they didn't bring anybody in here. Use your common sense. It doesn't take a genius to figure out why they didn't have anybody here, does it?

They didn't have one single member of the community, not one person who came in here and said that he had given them a problem in his thirty-three and a half or more years. They could have brought somebody else in, couldn't they? But they didn't. You can use your common sense and figure out why they're not here, can't you?

These experts are independent. They are impartial. They're paid with government tax dollars. They're not paid by me. They're not paid by Mr. Guerinot. They're not paid by this man. Their opinions are valid and they need to be looked at.

If for some reason, and I'd have to respect it, you decide that Issue Number One should be answered

yes beyond a reasonable doubt, then there's an issue that you have to look at. And if [255]you're there in these deliberations, they ask you if there are sufficient mitigating circumstances where life in prison is more appropriate than death.

Now, mitigating can be anything anyone thinks it is. There is no particular definition for it. It could be many factors. It could be the totality of the circumstances. Most of you answered that just one thing wouldn't be enough, but here you have a whole lot of factors. He lost his mother when he was eleven years old in a car accident. His dad went to prison in '73. He was an ex-convict before Duane even got out of High School. His dad has been arrested again and again and again. We have cocaine abuse and we have alcohol abuse.

Then we have the setting of the crime itself, the fact that it was a crime of passion and jealousy. So obviously one of these may not be enough but if you look at the whole picture, if you put it all together, it could be [256]sufficient and we would submit it is sufficient where life in prison would be the more appropriate punishment.

Answering these questions in a way whereby Mr. Buck receives the death penalty isn't going to bring anybody back. It's not going to bring back their mother. It's not going to bring Kenneth Butler back. Nothing is going to change the fact that Phyllis got shot. It won't change anything.

We don't react to crimes that way. We decide them on the evidence. I'd ask you to spare his life based on the evidence. Thank you for your time and attention.

ARGUMENT ON BEHALF OF THE STATE

BY MS. HUFFMAN:

Ladies and gentlemen, I too thank you for the attention that you have paid even at this late hour. My comments are going to be brief today. You've heard all the evidence in the [257]case and now it becomes your job to decide what the fate of this defendant will be. You've all indicated that this is probably the most important decision that you will ever make in your life and I wouldn't disagree with that.

What your job is now is to go back in and reconsider the evidence you've heard and answer those two questions. You as the twelve jurors absolutely will know what the results are going to be based on how you answer the questions. You're not responsible for what's going to happen to Mr. Buck. The State of Texas has certain laws. You twelve people happen to be reasonable people who met the standard to be on this jury in this kind of a case and you are simply fulfilling your duties as citizens, as the jurors in this case, and that's all we're asking you to do. All we're asking you to do is make an objective decision

based on the evidence. You don't have to go back and feel guilty about your decision or [258]feel guilty about what's going to happen to Mr. Buck in the future because you just don't have to feel like that. You go back there and you make your decision based on the evidence. The evidence is overwhelming in this case.

You have two things to consider. First of all, you have to decide if Mr. Buck will be a continuing threat to society. Is he going to commit criminal acts of violence in the future such that he is a continuing threat to society? More specifically, is there a probability that he's going to continue to be a threat to society?

We talked about what probability meant, a probability. We told you that when there is no legal definition, that you use your common sense. A lot of you talked about the fact that it meant more likely than not. Some of you had varying definitions but basically you felt it meant more likely than not.

Every one of you told us that there might be some cases where based [259]just on the evidence, the facts of the capital murder itself, that they could be so overwhelming, so heinous, so violent, so thought out, so premeditated, so blatant, so violent, that they in themselves would cause you to believe that the defendant would be a continuing threat to society. I would suggest to you that this is exactly what you have in this case.

You have even more evidence though because you do have a history in this case. You have a history of trips to the penitentiary, carrying a weapon, a history of being involved in the criminal justice system with no sign whatsoever of being rehabilitated. The defendant was given a chance on probation at some point but he got in trouble again and he went back to prison, served some time in prison and then was out of prison before his sentence was over which you can tell from the evidence that he was out before his sentence was over. Then he's out of [260]prison and he commits a capital murder.

These are the things you know about the defendant that tell you something about his character and his ability to follow the rules and his desire to change himself or rehabilitate himself.

You heard from Vivian Jackson who told you that he abused her, that he threatened her with weapons, that he beat her, and he got away with it over the years through coercion and threats.

What else do you know? You heard from the Defense's own experts that they called who prepared reports to aid you in the defense of this man. You heard from Dr. Quijano, who had a lot of experience in the Texas Department of Corrections, who told you that there was a probability that the man would commit future acts of violence.

MR. EASTERLING: That's a misstatement of the evidence. He said there was a low probability and not a [261]probability.

THE COURT: You're the fact finders. You heard the evidence.

BY MS. HUFFMAN:

I'm only telling you what I heard. I gave him every opportunity to explain it, to be honest with you, and I thought what he said was that he was at the low range but the probability did exist that he would be a continuing threat to society. You can go back there and discuss what you heard but I would submit to you that's what the man said. He's an expert in the field.

The other gentleman, Dr. Lawrence, he told you that he couldn't make any guarantees.

That's what you jurors are allowed to make your determination on as to whether the probability exists that he would be a continuing threat to society. That's the way the law is set up. If the State wanted to have a panel [262]of psychiatrists and psychologists in here to make that determination, that's what there would be. That is not the law though. The law says that you twelve people are reasonable citizens and you will make the call. You will make the ultimate decision about whether or not a defendant is a continuing threat to society.

We talked about premeditation some too. You heard a lot of evidence that tells you that this defendant premeditated this crime. That's one of the factors that the doctors have said is a serious consideration when determining the probability of future dangerousness. This was a completely premeditated crime. I'm not going to go over in detail with you about these seventeen deliberate steps so I hope you remember that since it was just yesterday, but I want you to think about those marks on the board and think about every step that this defendant took when he made his conscious decision to commit [263]his act.

Think about his lack of remorse which is also another important fact that the doctor told you you could consider in determining future dangerousness. It tells you something about the person.

It's unquestioned that he was laughing about what he had done. You heard Deputy Warren testify that when he was transporting him that he told him that the bitch deserved it. He told you that the defendant said something about the fact that he had been forgiven by God even before he went over there. That tells you something about the person. Certainly that's premeditated because he knew exactly what he was going to do before he went over there. I think that's a pretty scary person who thinks that they can do absolutely anything that they want to do. Does that indicate

to you that that person is a continuing threat to society when they think they have absolution for something [264]before they commit the most heinous crimes you can think of? He thought that he was absolved from that responsibility.

Think about how scary that is. This is what you're dealing with with this defendant. These are the things that you think about when you're determining if he's a continuing threat to society and what your answer should be.

Think about the victims he chose to kill and shoot at that day. The Defense has told you that the motivation for the crime was jealousy and anger. Well, he had plenty of time to think about it. We all have had disappointments in life. We've all probably been jilted by a man or a woman or have been disappointed because something went wrong in our life. That's life. That just happens. That's the way it is. You don't respond in the manner which this man has responded in.

On top of killing those people, [265]he also shoots his own sister, the woman he grew up with, the woman he knew. He knew she had a family. He knew all about her and yet he was the kind of person who could point a gun at her chest, watch her face, pull the trigger, and then go on to commit more acts within just a few minutes.

Think about what kind of a person it took to do that. Think about when he shot Phyllis Taylor. At that time he was a continuing threat to society when he went on to shoot the other people, was he not? He shot Kenneth Butler. After he shot Kenneth Butler was he a continuing threat to society? If Debra were here, she'd vouch for that because then he shot Debra Gardner.

This is a man that made deliberate decisions. Think about this. After you had killed a person, after you had shot someone at close range with a gun we could imagine the type of damage it would do, the person is spitting up [266]blood, gasping for air, and you see the results of your handiwork, saw the results of what he did, and yet he's the type of person that continues his assault. He continues his path to the next victim, to the next victim, to the next victim.

That tells you about this person and is something you should consider when you're determining whether or not he's a continuing threat to society. These are the type of factors that I'm asking you to consider when you make that determination.

You know that if he goes into the general population in prison that he is a risk with alcohol and with drugs. The experts told you that. You also heard from the evidence that alcohol and drugs are available in prison. It's a sad commentary on our system but it's the truth. You know all these

things. You know those risk factors are going to be there. As we have discussed, everybody in society has the right to be [267]protected from this defendant wherever he may go.

He has proven to you that he is going to be a continuing threat. I don't think there's any way that reasonable people can look at this defendant's background and the evidence in this case, and his lack of remorse, and his deliberateness of action, and argue reasonably that he would not be a continuing threat to society. Remember it's only a probability that he will be a threat to society. I think the answer to Question Number One is clearly yes.

Briefly with regard to Issue Number Two, you know your job is to look at all of the evidence. We talked about this on voir dire too. There is simply nothing there. Think about the facts of what this defendant has done, the enormity of his crime, the enormity of what he has left behind, the results of his crime, and you weigh the threat that this man is to society, there is nothing you can find in the evidence that [268]mitigates towards a life sentence for this defendant. It's just not there.

Everybody has had hardships in life. Everyone has had hard times. Probably everybody here has had a parent who has died or someone close to them who has died that made their life sad. Everybody has had bad times. A lot of people

have had a parent or maybe even two parents that did not live up to their expectations. That does not give you a free ticket to kill and it does not excuse your behavior.

Mr. Easterling argues to you about cocaine and alcohol dependency. There is no evidence whatsoever that this defendant was under the influence of any alcohol or cocaine at the time he committed the offense. I believe one witness stated he had a beer in his hand when he first came to Debra's house the first time. That's the only evidence of that. He doesn't get points for that.

Whether he has a cocaine or alcohol problem or otherwise, you may [269]think that because he has been arrested for possession of cocaine. On the other hand, he also sold cocaine. That doesn't prove anything. There's no real evidence of that other than his self-reporting to his expert.

He has low intelligence but he is not mentally retarded. He's around the average intelligence group that you would find in the prisoner jail population according to the expert. You know that if a person is in the lower range of intelligence that they have a higher likelihood of being violent. That's what their own expert told you, so when you weigh that it balances out. He may have a little lower intelligence but he's more likely to be violent.

There is absolutely nothing that's in evidence that would call for you as the jury to give this man some type of break because he doesn't deserve it. He made a lot of choices almost two years ago and he knew the results of what his choices were going to be. He [270]knew the victims. It wasn't anything to do with an impulsive act where he didn't have time to think about what the results were going to be or what the aftermath of his crime was going to be. He knew Debra Gardner. He had lived in the house there with her. He knew that she had children. He knew they were going to be left behind without a mother to raise them and that they'd have to live with different family members. He knew that his sister had children. Maybe he didn't know that much about Kenneth Butler but at least he knew he had a brother. He knew he didn't deserve to die.

He knew when he shot Debra Gardner that she was begging for her life. He knew her own children were watching her and he knew that her own children were begging him not to kill their mother. What kind of man would do that? He knew there were younger children involved that loved Debra Gardner. You heard about the little [271]four-year old girl that the officer believed was also her daughter. He knew that. He knew that she was begging him not to kill her in front of her children, begging for her life, and yet he killed her. That tells you what kind of man he is.

Society encompasses a lot of people. Society has the right to be protected from people like Duane Buck. Cases like this are why the State of Texas has the death penalty because people like Duane Buck make choices in their life. He's done nothing for society. He's a burden to society. You've seen nothing that shows that he can give anything to society. He's given nothing, nothing at all except to kill and leave in his wake a family who grieves. That's all that's left.

I'm asking you to do the job that you've been selected to do. I'm asking you to go back to that jury room and to fairly look at the evidence and look at this man very carefully and [272]think about the acts that he did, the intentional and deliberate acts he committed, and I think in your heart you will find that he deserves exactly what the evidence shows, what it shows you that he deserves, and that is a yes answer to the first issue and a no answer to the second issue. I would ask you to answer those questions in that way.

Thank you very much.

(At this time the jury is retired to deliberate.)

ALL JURY NOTES, MAY 6-7, 1997

REQUEST OF THE JURY, AND REPLY OF THE COURT FILED 5/6/97

Can we talk about parole with a life imprisonment?

/s/ Michael D. Rupe
Michael D. Rupe

[COURT STAMP OMITTED]

Refer to the charge.

Judy Collins

REQUEST OF THE JURY, AND REPLY OF THE COURT FILED 5/6/97

Can we please get a list of all evidence submitted in this case?

/s/ Michael D. Rupe
Michael D. Rupe

[COURT STAMP OMITTED]

There is no "list."

Judy Collins

REQUEST OF THE JURY
FILED 5/6/97

Can we please get the psychology reports submitted today and police records submitted today?

/s/ Michael D. Rupe
Michael D. Rupe

[COURT STAMP OMITTED]

REQUEST OF THE JURY,
FILED 5/7/97

Can we please get the video tape submitted?

/s/ Michael D. Rupe
Michael D. Rupe

[COURT STAMP OMITTED]

PRESS RELEASE, OFFICE OF THE TEXAS ATTORNEY GENERAL, U.S. SUPREME COURT GRANTS STATE'S MOTION IN CAPITAL CASE, JUNE 5, 2000

Office of the Attorney General News Release Archive

Monday, June 5, 2000

US SUPREME COURT GRANTS STATE'S MOTION IN CAPITAL CASE

Case Remanded for a New Sentencing Hearing

AUSTIN - Texas Attorney General John Cornyn today said the United States Supreme Court has granted a request by the State of Texas that the death sentence imposed in the capital murder case against Victor Hugo Saldano be vacated and remanded for a new sentencing hearing. The new trial will concern only the issue of punishment, not the judgment of guilt, which remains intact.

Saldano was convicted in 1996 of capital murder in Collin County for the murder of Paul King. Evidence presented at the trial showed that Saldano and an accomplice used a handgun to kidnap King from a grocery store parking lot. He was taken to a secluded spot on a country road where Saldano fatally shot King five times, including once in the head at point-blank range. Saldano stole Kings wallet and watch.

"There is no doubt of Mr. Saldano's guilt. A jury properly convicted him of capital murder and that conviction remains in place. During the sentencing phase of the trial, there was sufficient evidence submitted to the jury of Mr. Saldano's 'future dangerousness,' justifying the imposition of the death penalty," Cornyn stated. "Unfortunately, however, evidence of the defendant's race was also introduced before the jury by a district attorney as a factor for the jury to weigh in making its determination. This violated Mr. Saldano's constitutional right to be sentenced without regard to the color of his skin."

Cornyn also said, "We've been conducting an audit over the past couple of months. We've identified eight other cases that may be similar. We will release our findings by the end of the week. We will continue to vigilantly monitor all death penalty cases. Our goal is to assure the people of Texas that our criminal justice system is fairly administered."

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Contact Mark Heckmann, Heather Browne, or Tom Kelley at (512) 463-2050

PRESS RELEASES, OFFICE OF THE TEXAS ATTORNEY GENERAL, STATEMENT FROM ATTORNEY GENERAL JOHN CORNYN REGARDING DEATH PENALTY CASES, JUNE 9, 2000

Office of the Attorney General News Release Archive

Friday, June 9, 2000

Statement from Attorney General John Cornyn regarding death penalty cases:

"It has been eight weeks since I first identified problems associated with the testimony of Dr. Walter Quijano, an expert witness in the capital murder trial of Victor Hugo Saldano. As I explained in a filing before the United States Supreme Court on May 3, it is inappropriate to allow race to be considered as a factor in our criminal justice system. On June 5, the United States Supreme Court agreed. The people of Texas want and deserve a system that affords the same fairness to everyone. I will continue to do everything I can to assure Texans of our commitment to an equitable criminal justice system.

"After a thorough audit of cases in our office, we have identified eight more cases in which testimony was offered by Dr. Quijano that race should be a factor for the jury to consider in making its determination about the sentence in a capital murder trial.

"Six of these eight cases are similar to that of Victor Hugo Saldano. We have sent letters to opposing counsel and to the local prosecutors involved advising them of our

findings. Two of these eight cases are dissimilar to the Saldano case. In one, the defendant is not a member of a racial group included in Dr. Quijano's statistical model. In the other, the prosecution did not introduce race as a factor.

"In addition, my office has reviewed case files for all executions in Texas since 1982 and we have not found any cases in which a defendant was executed on the basis of this kind of testimony by Dr. Quijano. Also, we have reviewed the cases of all inmates currently scheduled for execution and none of those involves this kind of testimony by Dr. Quijano.

"Additionally, local prosecutors have been advised to review their cases that have not yet reached the attorney general's office."

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Contact Mark Heckmann, Heather Browne, or Tom Kelley at (512) 463-2050

Office of the Attorney General News Release Archive

Friday, June 9, 2000

AUSTIN - Texas Attorney General John Cornyn offers the following information on capital cases that involved Dr. Walter Quijano's testimony using race as a factor to determine future dangerousness.

Gustavo Julian Garcia, Collin County, cause number 366-80185-91
Case status: pending in federal district court on habeas corpus review

Convicted of capital murder on December 6, 1991 and sentenced to death. Garcia shot and killed Craig Turski while robbing a liquor store on December 9, 1990, in Plano, Texas.

Garcia confessed in writing to being the shooter. Garcia also confessed to being involved in the capital murder of Gregory Martin on January 5, 1991. Martin was killed during a robbery of a Texaco station in Plano, Texas.

Eugene Alvin Broxton, Harris County, cause number 599-218
Case status: pending in federal district court on habeas corpus review

Convicted of capital murder on April 30, 1992 and sentenced to death. In May of 1991, Broxton forced himself into the Houston hotel room of Waylon and Sheila Dockens.

Broxton bound, gagged, pistol-whipped and then shot the couple. Waylon Dockens survived.

Sheila did not. At the punishment phase of Broxton's capital murder trial, evidence was introduced that Broxton had been charged with the capital murders of Gary Stuchwisch on April 6, 1991, Gordon Miller on April 19, 1991 and Albert Krigger on May 16, 1991.

John Alba, Collin County, cause number 219-81215-91
Case status: headed to Fifth Circuit Court of Appeals for review

Convicted of capital murder on May 1, 1992 and sentenced to death. Alba shot and killed his wife Wendy Alba, after breaking into the home of friends where Wendy fled after leaving Alba. Alba also shot Wendy's friend several times, but she survived.

Michael Dean Gonzales, Ector County, cause number D-23,730
Case status: pending in federal district court on habeas corpus review

Convicted of capital murder on December 7, 1995 and sentenced to death for killing Manuel and Merced Aguirre. In April of 1994, Gonzales entered the Aguirre's home and stabbed Manuel and Merced to death. A microwave, VCR, camera, pistol, and stereo were found missing. There was no sign of forced entry. Gonzales was arrested 15 days after the murders.

Gonzales later confessed to a jail guard, who was his cousin, that he killed the Aguirres.

Carl Henry Blue, Brazos County, cause number 23,293-272
Case status: pending in federal district court on habeas corpus review

Convicted of capital murder on April 13, 1995 and sentenced to death. Blue poured gasoline on Carmen Richards-Sanders and her boyfriend and set her on fire. Blue then forced his way into her apartment and robbed her. Carmen Richards-Sanders later died.

Duane Buck, Harris County, cause number 699-684
Case status: pending in state habeas corpus

Convicted of capital murder in May of 1997 and sentenced to death for killing two people while on a shooting spree in the home of his ex-girlfriend, after an argument. Buck killed his ex-girlfriend, Debra Gardner, in the middle of the street, in front of her daughter. He also shot and killed a friend of Gardner's Keith Butler, who was at Gardner's home. Buck also shot his sister in the chest, who was also at Gardner's house, but she survived.

UNRELATED CASES

Two of these eight cases are dissimilar to the Saldano case. In the Blair case, the defendant is not a member of a racial group included in Dr. Quijano's statistical model. In the Graves case, the prosecution did not introduce race as a factor.

Michael Blair, Collin County, cause number 366-81344-93
Case status: pending in federal district court on habeas corpus review

Convicted of capital murder on September 28, 1994 and sentenced to death. Late in the morning on September 4, 1993, Blair kidnapped seven-year-old Ashley Estell from a park in Plano, Texas. Ashley Estell was watching her brother's soccer tournament. Her half-clothed body was found the day after she was kidnapped next to a ditch along a dirt road a few miles away. The cause of death was strangulation.

Anthony Charles Graves, Burleson County, cause number 28,165
Case status: pending in federal district court on habeas corpus review

Convicted of capital murder on October 27, 1994 and sentenced to death. Graves, along with co-defendant Robert Carter, stabbed and then burned Bobbie Davis (age 45), Nicole Davis (age 16, who was also shot), Lea Erin Davis (age 5), Brittany Davis (age 6), Jason Davis (age 4, Robert Carter's son) and Denitra Davis (age 9), at their home in Somerville, Texas, on August 18, 1992. Robert Carter was executed on May 31, 2000.

Contact Mark Heckmann, Heather Browne, or Tom Kelley at (512) 463-2050

MEMORANDUM AND ORDER FROM THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (HOUSTON DIVISION) GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PETITIONER'S WRIT OF HABEAS CORPUS, JULY 24, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DUANE EDWARD BUCK,	§	
	§	
Petitioner,	§	
	§	
v.	§	H-04-3965
	§	
DOUG DRETKE, Director, Texas Department of Criminal Justice-Correctional Institutions Division,	§	
	§	
Respondent.	§	

July 24, 2006, Decided
July 24, 2006, Filed

Memorandum and Order

This case is before the Court on Petitioner Duane Edward Buck's Petition for Writ of Habeas Corpus and Respondent Doug Dretke's Motion for Summary Judgment. Having carefully considered the Petition,

the Summary Judgment Motion, the evidence, and the arguments and authorities submitted by counsel, the Court is of the opinion that Respondent's Motion for Summary Judgment should be GRANTED, and Buck's Petition for Writ of Habeas Corpus should be DENIED.

I. Background[1]

During the early morning hours of July 30, 1995, Harold Ebenezer, his brother Kenneth Butler, Buck's sister Phyllis Taylor, and Debra Gardner all gathered at Gardner's house after a night out playing pool. Buck lived in the house with Gardner on and off over the previous few years, but Gardner and Buck broke up two or three weeks earlier.

Buck banged loudly on Gardner's door and Gardner called "911." Buck then forced the door open and entered the house. He argued with Gardner and struck her. Buck then stated that he was there to pick up his clothes. He retrieved a few things and left.

At about 7:00 a.m., Buck returned with a rifle and shotgun. Upon entering the house, he shot at Ebenezer but missed; Ebenezer fled the house. Buck then walked up to his sister, Taylor, put the muzzle of one of the guns against her chest, and shot her. Taylor survived.

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1. The facts are adapted from the opinion of the Texas Court of Criminal Appeals ("TCCA") on Buck's direct appeal. *See Buck v. State*, No. 72,810 at 2-3 (Tex. Crim. App. Apr. 28, 1999). Any significant divergence from the TCCA statement of facts is noted with a specific citation to the record.

After she was shot, Taylor heard more shots coming from the vicinity of the bedrooms. As she made her way through the house, Taylor saw Butler's body in the hallway. After escaping, Ebenezer also heard two or three more shots fired inside the house. As he came around to the front of the house, Ebenezer saw Gardner walking toward the street with Buck following her.

Devon Green, Gardner's son, hid in the closet after hearing the first shot fired. Shortly thereafter, he heard Buck's voice accusing Butler of sleeping with "his wife," followed by another gunshot. After a short while, Green looked out into the hall and saw Butler leaning against the wall bleeding. Green then ran outside and saw Buck shoot his mother and put two guns in the trunk of his car. Gardner's teenage daughter, Shennel Gardner, also saw Butler in the hallway after he was shot and then went outside and saw Buck shoot her mother. Both Butler and Gardner died from their wounds.

When police arrived, both Green and Ebenezer identified Buck as the shooter. Police subsequently retrieved a shotgun and a .22 caliber rifle from the trunk of Buck's car.

During the penalty phase, the State presented evidence of Buck's prior convictions for delivery of cocaine and unlawfully carrying a weapon. 28 Tr. at 5-28.[2] Vivian Jackson, Buck's ex-girlfriend and the mother of Buck's son, testified that Buck physically abused her and threatened

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2. "Tr." refers to the transcript of Buck's trial.

her with a gun. *Id.* at 30-36. One of the police officers who accompanied Buck after his arrest testified that Buck was laughing. When the officer commented that he did not think the situation was very funny, Buck responded: "The bitch deserved what she got." *Id.* at 62-70.

Buck presented evidence that he is a peaceful, nonviolent, person, that his mother died when he was 12 years old, that he worked as an auto mechanic, and that his father served several jail sentences for non-violent felonies. *Id.* at 76-100. The defense also called Dr. Walter Quijano, a clinical psychologist, as an expert witness. Dr. Quijano opined, based on his evaluation of Buck, that Buck has a dependent personality disorder. People suffering from this disorder can become obsessive about relationships and have a very difficult time letting go after a relationship ends.

Dr. Quijano also testified that several factors can be predictive of future dangerousness. These include, according to Dr. Quijano, past violent behavior, the age and sex of the defendant (with older defendants less likely to be violent in the future, and male defendants more likely than female defendants to be violent), socio-economic status, and history of substance abuse. Dr. Quijano also testified that race is a statistical predictor of future dangerousness based on the fact that Latinos and African-Americans are over-represented in the penal system. Applying these factors to Buck, Quijano testified that Buck's lack of a violent past made it less likely that he would be violent in the future. Based on his selection of victims (a former girlfriend) and his prison disciplinary

record, Quijano concluded that he is unlikely to be violent in prison. *Id.* at 101-20.

Buck also called Dr. Patrick Gordon Lawrence, another clinical psychologist. Dr. Lawrence agreed that Buck has a dependent personality and that he poses a low probability of future violence. *Id.* at 177-206. The jury found that Buck posed a future danger to society, and that there was insufficient mitigating evidence to justify a sentence of life imprisonment. Accordingly, the trial court sentenced Buck to death. 29 Tr. at 278.

The TCCA affirmed Buck's conviction and sentence on April 28, 1999. *Buck v. State*, No. 72,810 (Tex. Crim. App. Apr. 28, 1999). On March 22, 1997, Buck filed a state habeas corpus petition. On December 13, 2002, he filed a successive state habeas application. SH. at 2.[3] On January 23, 2003, the trial court found that Buck's second petition was a subsequent habeas application and ordered the clerk to send it to the TCCA. *Id.* at 18-19. The trial court recommended denying Buck's original petition on July 23, 2003. SH. at 119-27. On October 15, 2003, the TCCA adopted the trial court's findings and recommendation and denied Buck's first application, and dismissed his second application as an abuse of the writ. *Ex Parte Buck*, Nos. 57,004-01, -02 (Tex. Crim. App. Oct. 15, 2003) (*per curiam*). On October 14, 2004, Buck filed this timely federal petition for a writ of habeas corpus.

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3. "SH." refers to the transcript of Buck's state habeas corpus proceeding.

II. The Applicable Legal Standards

A. The Anti-Terrorism and Effective Death Penalty Act

This federal petition for habeas relief is governed by the applicable provisions of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which became effective April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 335-36 (1997). Under the AEDPA, federal habeas relief based upon claims that were adjudicated on the merits by the state courts cannot be granted unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Kitchens v. Johnson*, 190 F.3d 698, 700 (5th Cir. 1999).

For questions of law or mixed questions of law and fact adjudicated on the merits in state court, this Court may grant federal habeas relief under 28 U.S.C. § 2254(d)(1) only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]." *See Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.), *cert. denied*, 534 U.S. 885 (2001). Under the "contrary to" clause, this Court may afford habeas relief only if "'the state court arrives at a conclusion opposite to that reached by . . [the Supreme Court] on a question of law or if the state court decides a case differently than . [the Supreme Court] has on

a set of materially indistinguishable facts.'" *Dowthitt v. Johnson*, 230 F.3d 733, 740-41 (5th Cir. 2000), *cert. denied*, 532 U.S. 915 (2001) (quoting *Terry Williams v. Taylor*, 529 U.S. 362, 406 (2000)).[4]

The "unreasonable application" standard permits federal habeas relief only if a state court decision "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Terry Williams*, 529 U.S. at 406. "In applying this standard, we must decide (1) what was the decision of the state courts with regard to the questions before us and (2) whether there is any established federal law, as explicated by the Supreme Court, with which the state court decision conflicts." *Hoover v. Johnson*, 193 F.3d 366, 368 (5th Cir. 1999). A federal court's "focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett*, 239 F.3d

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4. On April 18, 2000, the Supreme Court issued two separate opinions, both originating in Virginia, involving the AEDPA, and in which the petitioners had the same surname. *Terry Williams v. Taylor*, 529 U.S. 362 (2000), involves § 2254(d)(1), and *Michael Williams v. Taylor*, 529 U.S. 420 (2000), involves § 2254(e)(2). To avoid confusion, this Court will include the full name of the petitioner when citing to these two cases.

683, 696 (5th Cir. 2001), *aff'd*, 286 F.3d 230 (5th Cir. 2002) (en banc), *cert. denied sub nom. Neal v. Epps*, 537 U.S. 1104 (2003). The solitary inquiry for a federal court under the 'unreasonable application' prong becomes "whether the state court's determination is 'at least minimally consistent with the facts and circumstances of the case.'" *Id.* (quoting *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997)); *see also Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir. 2001) ("Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.'").

The AEDPA precludes federal habeas relief on factual issues unless the state court's adjudication of the merits was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254 (d)(2); *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000), *cert. denied*, 532 U.S. 1039 (2001). The State court's factual determinations are presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Jackson v. Anderson*, 112 F.3d 823, 824-25 (5th Cir. 1997), *cert. denied*, 522 U.S. 1119 (1998).

B. The Standard for Summary Judgment in Habeas Corpus Cases

"As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies

with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000). Insofar as they are consistent with established habeas practice and procedure, the Federal Rules of Civil Procedure apply to habeas cases. *See* Rule 11 of the Rules Governing Section 2254 Cases. In ordinary civil cases, a district court considering a motion for summary judgment is required to construe the facts in the case in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"). Where a state prisoner's factual allegations have been adversely resolved by express or implicit findings of the state courts, however, and the prisoner fails to demonstrate by clear and convincing evidence that the presumption of correctness established by 28 U.S.C. § 2254(e)(1) should not apply, it is inappropriate for the facts of a case to be resolved in the petitioner's favor. *See Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Foster v. Johnson*, 293 F.3d 766, 777 (5th Cir.), *cert. denied sub nom Foster v. Epps*, 537 U.S. 1054 (2002); *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000), *cert. denied*, 532 U.S. 915 (2001); *Emery v. Johnson*, 940 F.Supp. 1046, 1051 (S.D. Tex. 1996), *aff'd*, 139 F.3d 191 (5th Cir. 1997), *cert. denied*, 525 U.S. 969 (1998). Consequently, where facts have been determined by the Texas state courts, this Court is bound by such findings unless an exception to 28 U.S.C. § 2254 is shown.

III. Analysis

Buck's petition raises eight claims for relief. These are addressed in turn.

A. Informing The Jury About Parole Eligibility

In his first claim for relief, Buck argues that the trial court violated his Fourteenth Amendment right to due process of law by refusing to inform, or allow Buck to inform, the jury of the law concerning Buck's parole eligibility if sentenced to life imprisonment. Buck contends that this unfairly impeded his ability to rebut the State's argument that he posed a future danger to society. In his second claim, Buck argues that this lack of information renders his sentence violative of the Eighth Amendment because it impeded his ability to offer mitigating evidence. In his third claim, Buck argues that the trial court's refusal to permit testimony concerning parole eligibility violated Buck's rights under the compulsory process clause of the Sixth Amendment.

The crux these three claims is whether the fact that a life sentence would make Buck ineligible for parole until he served 40 years in prison was relevant to the issue of his future dangerousness. He argues that his expert witnesses were not permitted to testify that this was a factor in their conclusions that he was not a future danger, and that his lawyers were also not permitted to inform the jury of this part of his experts' analysis.

Petitioner argues that his position is supported by the United States Supreme Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994). At the time of Simmons' conviction, South Carolina allowed for a sentence of life in prison without the possibility of parole upon conviction of a capital offense. In *Simmons*, the defense sought an instruction informing the jury that life imprisonment would carry no possibility of parole, but the trial court refused. The Supreme Court held that when "the alternative sentence to death is life without parole . . due process plainly requires that [the defendant] be allowed to bring [parole ineligibility] to the jury's attention by way of arguments by defense counsel or an instruction from the court." *Simmons*, 512 U.S. at 169 (citing *Gardner v. Florida*, 430 U.S. 349, 362 (1977)).

The *Simmons* court reasoned that when a state imposes the death penalty on the premise that the convicted individual poses a danger to society, the fact that the defendant may receive life without possibility of parole "will necessarily undercut the State's argument regarding the threat the defendant poses to society." *Simmons*, 512 U.S. at 169. To hold otherwise would create a "false dilemma by advancing generalized argument regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." *Id.* at 171.

Simmons addresses very specific circumstances: (1) When the state seeks the death penalty at least in part on the grounds that the defendant will be a future danger to society; and (2) when the alternative to a sentence of death

is a sentence of life imprisonment without the possibility of parole.

> [I]f the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. Because truthful information of parole ineligibility allows the defendant to deny or explain the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court.

Simmons, 512 U.S. at 168-69 (internal quotation marks and citation omitted); *see also, Wheat v. Johnson*, 238 F.3d 357, 361-62 (5th Cir.), *cert. denied*, 532 U.S. 1070 (2001). While the State did seek a death sentence in this case partially on the basis that Petitioner would pose a continuing threat, the jury's alternative was a parole-eligible life sentence, not, as in *Simmons*, life without parole. *Id.* at 168 n.8.

The Fifth Circuit has repeatedly rejected Buck's claim.

> [T]he Supreme Court took great pains in its opinion in *Simmons* to distinguish states

> such as Texas, which does not provide capital sentencing juries with an option of life without parole, from the scheme in South Carolina which required an instruction on parole ineligibility . [T]he Fifth Circuit has repeatedly refused to extend the rule in *Simmons* beyond those situations in which a capital murder defendant is statutorily ineligible for parole.

Green v. Johnson, 160 F.3d 1029, 1045 (5th Cir. 1998), *cert. denied*, 525 U.S. 1174 (1999); *see also, Wheat*, 238 F.3d at 361-62 (5th Cir.), *cert. denied*, 532 U.S. 1070 (2001)(finding *Simmons* inapplicable to the Texas sentencing scheme); *Soria v. Johnson*, 207 F.3d 232 (5th Cir.), *cert. denied*, 530 U.S. 1286 (2000)(finding that "reliance on *Simmons* to demonstrate that the Texas capital sentencing scheme denied [petitioner] a fair trial is unavailing"); *Miller v. Johnson*, 200 F.3d 274, 290 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000) ("because Miller would have been eligible for parole under Texas law if sentenced to life, we find his reliance on *Simmons* unavailing")(internal quotation marks and citation omitted); *Hughes v. Johnson*, 191 F.3d 607, 617 (5th Cir. 1999), *cert. denied*, 528 U.S. 1145 (2000); *Muniz v. Johnson*, 132 F.3d 214, 224 (5th Cir.), *cert. denied*, 523 U.S. 1113 (1998)(stating that a claim based on *Simmons* "has no merit under the law in our circuit"); *Montoya v. Scott*, 65 F.3d 405, 416 (5th Cir. 1995), *cert. denied sub nom. Montoya v. Johnson*, 517 U.S. 1133 (1996) (holding that *Simmons* claims are foreclosed by recent circuit authority rejecting an extension of *Simmons* beyond situations in which a defendant is statutorily ineligible for parole"); *Allridge v. Scott*, 41 F.3d 213, 222

(5th Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995)(stating that "*Simmons* is inapplicable to this case"); *Kinnamon v. Scott*, 40 F.3d 731, 733 (5th Cir.), *cert. denied*, 513 U.S. 1054 (1994) (refusing to "extend *Simmons* beyond cases in which the sentencing alternative to death is life without parole").

If these decisions left any doubt that *Simmons* provides no basis for the relief Petitioner seeks, the Supreme Court removed all such doubt in *Ramdass v. Angelone*, 530 U.S. 156 (2000). "*Simmons* applies only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." *Id.* at 169.

In this case, life without parole was not a possibility. Petitioner faced one of two sentences: Death, or life imprisonment with the possibility of parole at a future date. Therefore, as *Ramdass* and Fifth Circuit precedent make unmistakably clear, Petitioner's claims do not fall within the scope of *Simmons*.

Insofar as Petitioner seeks an extension of *Simmons* to the Texas scheme, this Court is barred from granting habeas relief on that basis by the non-retroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989). *See Wheat*, 238 F.3d at 361 (finding any extension of *Simmons* to violate *Teague*); *Clark v. Johnson*, 227 F.3d 273, 282 (5th Cir. 2000), *cert. denied*, 531 U.S. 1167 (2001)(same); *Boyd v. Johnson*, 167 F.3d 907, 912 (5th Cir.), *cert. denied*, 527 U.S. 1055 (1999) ("Relief based on *Simmons* is foreclosed by *Teague*."). In *Teague*, the Supreme Court held that a

federal court may not create new constitutional rules of criminal procedure on habeas review. *Id.* at 301. Thus, even if controlling precedent did not expressly hold that the *Simmons* rule does not cover Petitioner's case, relief would be barred by *Teague*.

Buck also argues, citing *Skipper v. South Carolina*, 476 U.S. 1 (1986), that information about parole eligibility is relevant mitigating evidence because it "might serve as a basis for a sentence less than death." *Id.* at 4. He therefore contends that the trial court's refusal to allow Buck to inform the jury about parole eligibility violates his Eighth Amendment right to present mitigating evidence. The Fifth Circuit, however, has consistently found that the Eighth Amendment does not require that a jury be informed of parole eligibility. *See Tigner v. Cockrell*, 264 F.3d 521, 525 (5th Cir. 2001). Therefore, Petitioner's motion for relief on his first through third claims is DENIED.

B. Ineffective Assistance Of Counsel

Buck argues that the evidence supported a finding that he acted under the immediate influence of sudden passion arising from an adequate cause when he committed the murders. In his fourth claim for relief, Buck argues that his trial counsel rendered ineffective assistance by failing to request a lesser included offense instruction based on this theory.

To prevail on a claim for ineffective assistance of counsel, Petitioner

> must show that . . . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to prevail on the first prong of the *Strickland* test, Petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Reasonableness is measured against prevailing professional norms, and must be viewed under the totality of the circumstances. *Id.* at 688. Review of counsel's performance is deferential. *Id.* at 689.

Buck committed the murders on July 30, 1995. The Texas statute defining a homicide committed under the influence of sudden passion as the lesser included offense of voluntary manslaughter was repealed on September 1, 1994. *See* Acts 1993, 73rd Leg., ch. 900, § 1.01. Where the prior version of the statute defined manslaughter as a homicide committed under the influence of sudden passion, the amended version, which was in effect at the time of Buck's crime, defines manslaughter as "recklessly caus[ing] the death of the individual." Tex. Penal § 19.04. Therefore, Texas law did not provide for the lesser included offense on which Buck now claims he was entitled to a jury instruction. Indeed, petitioner admits that this statutory definition of voluntary manslaughter existed only "[p]rior to September of 1994 " Pet. at 47.

Counsel's failure to request a jury instruction unsupported by the law did not constitute deficient performance. "Counsel cannot be deficient for failing to press a frivolous point." *Sones v. Hargett*, 61 F.3d 410, 415 n.5 (5th Cir. 1995); *see also Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) ("This Court has made clear that counsel is not required to make futile motions or objections."). Therefore, petitioner fails to meet the first prong of the *Strickland* test and his petition for relief on this claim is DENIED.

C. Evidence Of Future Dangerousness Based On Race

Petitioner's fifth and sixth claims for relief relate to testimony offered during the penalty phase by Dr. Walter Quijano, who testified as an expert witness. Buck's counsel asked Dr. Quijano to discuss certain statistical factors relevant to determining whether a defendant poses a future threat to commit criminal acts of violence. Among the factors Dr. Quijano discussed was race. Dr. Quijano testified that "minorities, Hispanics and black people are over represented in our Criminal Justice System." 28 Tr. at 111. The prosecutor revisited this topic on cross-examination. Buck is African-American.

In his Fifth claim for relief, Buck argues that Dr. Quijano's reliance on race as a statistical predictor of future dangerousness, and the prosecutor's references to this testimony on cross-examination and in closing argument, violated Buck's Sixth and Fourteenth Amendment rights to an impartial jury, due process, and

equal protection of the law. In his Sixth claim for relief, Buck contends his counsel rendered ineffective assistance by eliciting this testimony from Dr. Quijano.

Buck concedes that he did not raise these claims either in his direct appeal or on his original state habeas corpus application, though he did raise them in his successive state habeas application. As noted above, the TCCA dismissed the successive petition as an abuse of the writ.

"When a state court declines to hear a prisoner's federal claims because the prisoner failed to fulfill a state procedural requirement, federal habeas is generally barred if the state procedural rule is independent and adequate to support the judgment." *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001). The Supreme Court has noted that

> [i]n all cases in which a state prisoner had defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). "This doctrine ensures that federal courts give proper respect to state procedural rules." *Glover v. Cain*, 128 F.3d 900,

902 (5th Cir. 1997) (citing *Coleman*, 501 U.S. at 750-51), *cert. denied*, 523 U.S. 1125 (1998); *see also Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (finding the cause and prejudice standard to be "grounded in concerns of comity and federalism").

To be "adequate" to support the judgment, the state law ground must be both "firmly established and regularly followed." *Ford v. Georgia*, 498 U.S. 411, 424 (1991). The Texas Court of Criminal Appeals applies its abuse of the writ doctrine regularly and strictly. *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir.) (per curiam), *cert. denied*, 515 U.S. 1153 (1995). Therefore, this claim is procedurally defaulted and this Court may not review the claim unless Buck demonstrates cause and prejudice, or that this Court's refusal to review the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.

"Cause" for a procedural default requires a showing that some objective factor external to the defense impeded counsel's efforts to comply with the state procedural rule, or a showing of a prior determination of ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Amadeo v. Zant*, 486 U.S. 214, 222 (1988). Buck does not argue that cause exists for his default.

A "miscarriage of justice" means actual innocence, either of the crime for which he was convicted or of the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 335 (1992). "Actual innocence of the death penalty" means that, but for a constitutional error, Buck would not have been legally eligible for a sentence of death. *Id.*

To show actual innocence,

> [T]he prisoner must 'show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial, the trier of the facts would have entertained a reasonable doubt of his guilt.

Kuhlmann v. Wilson, 477 U.S. 436, 455 n.17 (1986).

The penalty phase evidence showed that Buck had a history of domestic violence, including threatening his ex-girlfriend with a gun, shot his own sister during the rampage that resulted in the murders of Gardner and Butler, showed no remorse for the murders, and laughed when asked about the murders. This evidence was sufficient for the jury to conclude that Buck posed a future danger. Therefore, petitioner has not established that, but-for the allegedly improper testimony, he could not, as a matter of law, be sentenced to death. Because Buck fails to establish either cause for his procedural default nor actual innocence of the death penalty, this Court may not review his Fifth and Sixth claims for relief.

D. Burden Of Proof On Future Dangerousness

In his Seventh claim for relief, Buck argues that the future dangerousness special issue violates the rules of *Ring v. Arizona*, 536 U.S. 584 (2002) and *Blakely v.*

Washington, __U.S. __, 124 S.Ct. 2531 (2004). Specifically, Buck argues that the language of the statutory special issue, requiring the jury to determine whether there is a "probability" of future dangerousness, has the practical effect of reducing the burden of proof from "beyond a reasonable doubt" to a mere preponderance of the evidence, notwithstanding a specific statutory requirement of proof beyond a reasonable doubt.

Buck never presented these claims in state court. The AEDPA requires that a prisoner exhaust his available State remedies before raising a claim in a federal habeas petition.

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). As the Fifth Circuit explained in a pre -AEDPA case, "federal courts must respect the autonomy of state courts by requiring that petitioners advance in state court all grounds for relief, as well as factual allegations supporting those grounds. "[A]bsent special circumstances, a federal habeas petitioner must exhaust his state remedies by pressing his claims in state court before he may seek federal habeas relief." *Orman*

v. Cain, 228 F.3d 616, 619-20 (5th Cir. 2000); *see* 28 U.S.C. § 2254(b)(1) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State. . . .").

Ordinarily, a federal habeas petition that contains unexhausted claims is dismissed without prejudice, allowing the petitioner to return to the state forum to present his unexhausted claims. *Rose v. Lundy*, 455 U.S. 509 (1982). Such a result in this case, however, would be futile because Petitioner's unexhausted claims would be procedurally barred as an abuse of the writ under Texas law. A procedural bar for federal habeas review occurs if the court to which a petitioner must present his claims to satisfy the exhaustion requirement would now find the unexhausted claims procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

Texas prohibits successive writs challenging the same conviction except in narrow circumstances. Tex. CodeCrim.Proc.Ann. art. 11.071 § 5(a) (Vernon Supp. 2002). The Texas Court of Criminal Appeals will not consider the merits or grant relief on a subsequent habeas application unless the application contains sufficient specific facts establishing the following:

> (1) the current claims have not been and could not have been presented previously in an original application or in a previously considered application because the factual or

> legal basis for the claim was unavailable on the date the applicant filed the previous application; or
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.

Id.

Petitioner does not claim that he could not have presented the claim in one of his previous state habeas petitions because the factual basis for the claim did not exist, or that he is actually innocent. *Ring* was decided on June 22, 2002, and Buck did not file his successive state habeas petition until December 13, 2002. Therefore, Petitioner could have raised this claim in his prior successive state petition, and the unexhausted claim does not fit within the exceptions to the successive writ statute and would be procedurally defaulted in the Texas courts. *Coleman*, 501 U.S. at 735 n.1.[5] That bar precludes this Court from reviewing Petitioner's claim absent a showing of cause for the default and actual prejudice attributable to the default, or that this Court's refusal to review the claim will result in a fundamental miscarriage of justice. *Id.* at

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5. Buck also cites *Blakely v. Washington*, __ U.S. __, 124 S.Ct. 2531 (2004). While *Blakely* was not decided until after the TCCA dismissed both of Buck's state petitions, Buck does not argue that *Blakely* recognized any new substantive right concerning the burden of proof on aggravating factors. Rather, Buck merely argues that "*Blakely* confirms the foregoing *Ring* analysis." Pet. at 64.

750. Buck offers no argument that cause exists to excuse his default, or that he is actually innocent. Therefore, this Court cannot review his seventh claim.

E. Burden Of Proof On Lack Of Mitigation

The Texas capital sentencing statute requires the jury, after deciding that the defendant poses a future danger, to determine whether the defendant's mitigating evidence is sufficient to justify imposing a sentence of life imprisonment rather than death. Tex. Code Crim. Pro. art. 37.071(2)(e)(1). In his Eighth and final claim for relief, Buck argues that the Texas capital sentencing statute violates the rules of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely* because it does not place the burden on the prosecution to prove that the mitigating evidence is insufficient to justify a life sentence.

Apprendi itself rejects Buck's position.

> Finally, the principal dissent ignores the distinction the Court has often recognized, *see*, e.g., *Martin v. Ohio*, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987), between facts in aggravation of punishment and facts in mitigation. . . . If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a

> judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.

Apprendi, 530 U.S. at 491 n.16. The Supreme Court has thus drawn a critical distinction between aggravating and mitigating circumstances in sentencing proceedings. To the extent that some aggravating circumstance is required before the court may exceed an otherwise-prescribed sentencing range, the state must prove those aggravating circumstances beyond a reasonable doubt. Under the Texas capital sentencing statute, the statutory maximum sentence in the absence of proof of aggravating circumstances is life imprisonment. A court cannot sentence a defendant to death unless the State proves beyond a reasonable doubt that there is a probability that the defendant will commit future acts of violence constituting a continuing threat to society. Tex.Crim.Pro. art. 37.071(2)(b)(1). Once the State has proven this factor, the defendant may be sentenced to death.

The sentencing scheme, however, gives a defendant another opportunity to show that death should not be imposed, even though the State has met its burden of proof. The mitigation special issue is, in this sense, analogous to an affirmative defense. *Apprendi* does not

prohibit placing the burden of proof on this special issue on the defendant. The mitigation special issue does not address a factor necessary to increase the maximum sentence; rather, it addresses factors that allow the jury to impose a sentence *less than* the statutory maximum. Therefore, the mitigation special issue does not fall within the scope of *Apprendi*, and Buck is not entitled to relief on this claim.

IV. Evidentiary Hearing

Buck requests an evidentiary hearing. An evidentiary hearing is not required if there are "no relevant factual disputes that would require development in order to assess the claims." *Michael Williams v. Taylor*, 529 U.S. 420, 436 (2000) (stating that it was "Congress' [sic] to avoid unneeded hearings [sic] in federal habeas corpus"); *Robison v. Johnson*, 151 F.3d 256, 268 (5th Cir. 1998), *cert. denied*, 526 U.S. 1100 (1999). "If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require." Rule 8 of the Rules Governing Section 2254 Cases.

Each of Petitioner's claims can be resolved by reference to the state court record, the submissions of the parties, and relevant legal authority. There is, therefore, no basis upon which to hold an evidentiary hearing on these claims.

V. Certificate of Appealability

Buck has not requested a certificate of appealability ("COA"), but this Court may determine whether he is entitled to this relief in light of the foregoing rulings. *See Alexander v. Johnson*, 211 F.3d 895, 898(5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny a COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued.") A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does."). "A plain reading of the AEDPA compels the conclusion that COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone." *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997).

A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez*

v. Johnson, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). The Supreme Court has stated that

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). "The nature of the penalty in a capital case is a 'proper consideration in determining whether to issue a [COA], but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate.'" *Washington v. Johnson*, 90 F.3d 945, 949 (5th Cir. 1996), *cert. denied*, 520 U.S. 1122 (1997) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). However, "the determination of whether a COA should issue must be made by viewing the petitioner's

arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134 (2001).

This Court has carefully and exhaustively considered each of Buck's claims. While the issues Buck raises are clearly important and deserving of the closest scrutiny, the Court finds that each of the claims is foreclosed by clear, binding precedent. This Court concludes that under such precedents, Buck has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court concludes that Buck is not entitled to a certificate of appealability on his claims.

VI. Order

For the foregoing reasons, it is ORDERED as follows:

1. Respondent Doug Dretke's Motion for Summary Judgment (Docket Entry 7) is GRANTED;

2. Petitioner Duane Edward Buck's Petition For Writ Of Habeas Corpus (Docket Entry 1) is DENIED; and

3. No Certificate of Appealability shall issue in this case.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas, on this 24th day of July, 2006.

/s/ Vanessa Gilmore
Vanessa Gilmore
United States District Judge

MEMORANDUM AND ORDER FROM THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (HOUSTON DIVISION) DENYING PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FRCP 60(B)(6), AUGUST 29, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DUANE EDWARD BUCK,	§	
	§	
Petitioner,	§	
	§	
v.	§	H-04-3965
	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice-Correctional Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM AND ORDER

Pending is petitioner's motion for relief from judgment (Inst. # 49). Petitioner seeks relief from the judgment of this Court entered on July 24, 2006 (Inst. # 16).

Duane Edward Buck is currently incarcerated on death row in Texas. On July 24, 2006, this Court denied his petition for a writ of habeas corpus. Among the claims

denied were Buck's claims that he received ineffective assistance of counsel when his counsel called as an expert witness Dr. Walter Quijano, who mentioned an issue relating to race during the penalty phase of Buck's trial. Buck further contended that counsel was ineffective for failing to object when the prosecutor asked Dr. Quijano a question raising a racial issue on cross-examination. This Court found that those claims were procedurally defaulted, and the Fifth Circuit denied Buck's request for a certificate of appealability. *See Buck v. Thaler*, 345 Fed. App'x 923 (5th Cir., 2009).

In 2012, the Supreme Court issued its decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), holding that ineffective assistance of state habeas counsel could, in certain circumstances, constitute cause to excuse a procedural default of an ineffective assistance of trial counsel claim. In *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), the Supreme Court held that *Martinez* is applicable to the Texas capital postconviction process. On January 7, 2014, Buck, relying on *Martinez* and *Trevino*, filed the current motion for relief from the judgment of this Court under Rule 60(b)(6) of the Federal Rules of Civil Procedure (Inst. # 49).

I. Background

The facts are not in dispute. During the early morning hours of July 30, 1995, Harold Ebenezer, his brother Kenneth Butler, Buck's sister Phyllis Taylor, and Debra Gardner all gathered at Gardner's house after a night out playing pool. Buck lived in the house with Gardner

on and off over the previous few years, but Gardner and Buck broke up two or three weeks earlier.

Buck banged loudly on Gardner's door and Gardner called "911." Buck then forced the door open and entered the house. He argued with Gardner and struck her. Buck then stated that he was there to pick up his clothes. He retrieved a few things and left.

At about 7:00 a.m., Buck returned with a rifle and shotgun. Upon entering the house, he shot at Ebenezer but missed. Ebenezer fled the house. Buck then walked up to his sister, Taylor, put the muzzle of one of the guns against her chest, and shot her. Taylor survived.

After she was shot, Taylor heard more shots coming from the vicinity of the bedrooms. As she made her way through the house, Taylor saw Butler's body in the hallway. After escaping, Ebenezer also heard two or three more shots fired inside the house. As he came around to the front of the house, Ebenezer saw Gardner walking toward the street with Buck following her.

Devon Green, Gardner's son, hid in the closet after hearing the first shot fired. Shortly thereafter, he heard Buck's voice accusing Butler of sleeping with "his wife," followed by another gunshot. After a short while, Green looked out into the hall and saw Butler leaning against the wall bleeding. Green then ran outside and saw Buck shoot his mother and put two guns in the trunk of his car. Gardner's teenage daughter, Shennel Gardner, also saw Butler in the hallway after he was shot and then went

outside and saw Buck shoot her mother. Both Butler and Gardner died from their wounds.

When police arrived, both Green and Ebenezer identified Buck as the shooter. Police subsequently retrieved a shotgun and a .22 caliber rifle from the trunk of Buck's car.

The case was tried to a jury. The jury found Buck guilty of capital murder at the conclusion of the guilt-innocence phase of the trial.

During the penalty phase, the State presented evidence of Buck's prior convictions for delivery of cocaine and unlawfully carrying a weapon. Vivian Jackson, Buck's ex-girlfriend and the mother of Buck's son, testified that Buck physically abused her and threatened her with a gun. One of the police officers who accompanied Buck after his arrest testified that Buck was laughing. When the officer commented that he did not think the situation was very funny, Buck responded: "The bitch deserved what she got."

Buck presented evidence that he is a peaceful, nonviolent, person, that his mother died when he was 12 years old, that he worked as an auto mechanic, and that his father served several jail sentences for non-violent felonies. The defense also called Dr. Walter Quijano, a clinical psychologist, as an expert witness. Dr. Quijano opined, based on his evaluation of Buck, that Buck has a dependent personality disorder. People suffering from this disorder can become obsessive about relationships and have a very difficult time letting go after a relationship ends.

Dr. Quijano also testified that several factors can be predictive of future dangerousness. These include, according to Dr. Quijano, past violent behavior, the age and sex of the defendant (with older defendants less likely to be violent in the future, and male defendants more likely than female defendants to be violent), socio-economic status, and history of substance abuse. Dr. Quijano also testified that Latinos and African-Americans are over-represented in the penal system. Applying these factors to Buck, Quijano testified that Buck's lack of a violent past made it less likely that he would be violent in the future. Based on his selection of victims (a former girlfriend) and his prison disciplinary record, Quijano concluded that he is unlikely to be violent in prison.

Buck also called Dr. Patrick Gordon Lawrence, another clinical psychologist. Dr. Lawrence agreed that Buck has a dependent personality and that he poses a low probability of future violence. The jury found that Buck posed a future danger to society, and that there was insufficient mitigating evidence to justify a sentence of life imprisonment. Accordingly, the trial court sentenced Buck to death.

The Texas Court of Criminal Appeals ("TCCA") affirmed Buck's conviction and sentence on April 28, 1999. *Buck v. State*, No. 72,810 (Tex. Crim. App. Apr. 28, 1999). On March 22, 1997, Buck filed a state habeas corpus petition. On December 13, 2002, he filed a successive state habeas application. On January 23, 2003, the trial court found that Buck's second petition was a subsequent habeas application and ordered the clerk to send it to the TCCA.

The trial court recommended denying Buck's original petition on July 23, 2003. On October 15, 2003, the TCCA adopted the trial court's findings and recommendation and denied Buck's first application, and dismissed his second application as an abuse of the writ. *Ex Parte Buck*, Nos. 57,004-01, -02 (Tex. Crim. App. Oct. 15, 2003) (*per curiam*).

On October 14, 2004, Buck filed his federal petition for a writ of habeas corpus. This Court denied his petition on July 24, 2006, the Fifth Circuit denied Buck's request for a certificate of appealability, *Buck v. Thaler*, No. 06-70055 (5th Cir. Sept. 25, 2009), and the Supreme Court denied his petition for a writ of *certiorari*, *Buck v. Thaler*, 130 S.Ct. 2096 (2010).

On September 7, 2011, Buck filed a motion for relief from this Court's judgment. This Court denied that motion on September 9, 2011 (Inst. # 31). On September 12, 2011, Buck filed a motion to alter or amend the judgment denying his motion for relief from the judgment. This Court denied that motion on the same day (Inst. # 36). The Fifth Circuit denied Buck's request for a certificate of appealability on September 14, 2011. *Buck v. Thaler*, 452 Fed. App'x 423 (5th Cir. 2011). The Supreme Court denied Buck's petition for a writ of *certiorari* on November 7, 2011. *Buck v. Thaler*, 132 S.Ct. 32 (2011).

The Supreme Court decided *Martinez* in 2012, and *Trevino* in 2013. On January 7, 2014, Buck filed this Rule 60(b) motion.

II. Analysis

In this renewed motion for relief from the judgment, Buck argues that his trial counsel rendered ineffective assistance by calling Dr. Quijano to testify. Buck's counsel asked Dr. Quijano to discuss certain statistical factors relevant to determining whether a defendant poses a future threat to commit criminal acts of violence. Among the factors Dr. Quijano discussed on direct examination was race. Dr. Quijano testified that "minorities, Hispanics and black people are over represented in our Criminal Justice System." The prosecutor asked an additional race related question on cross-examination. Buck is African-American.

In his habeas petition, Buck argued that Dr. Quijano's reliance on race as a statistical predictor of future dangerousness, and the prosecutor's reference to this testimony on cross-examination, invited the jury to consider his race as a predictor of future dangerousness. He also argues that his counsel rendered ineffective assistance by eliciting this race related testimony from Dr. Quijano, and that counsel was ineffective for failing to object when the prosecutor asked a question about this testimony during Quijano's cross examination.

Buck notes that the Texas Attorney General conceded error in several other cases involving similar testimony by the same witness. He contends that the Attorney General also stated that he would not assert procedural defenses to such claims in federal court, but asserted such a defense in this case.

Buck conceded that he did not raise these claims either in his direct appeal or in his original state habeas corpus application, though he did raise them in his successive state habeas application. The TCCA dismissed the successive petition as an abuse of the writ. This Court therefore had no choice but to find the claims procedurally defaulted. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

This Court also discussed whether Buck could avoid the procedural default by showing that he is "actually innocent of the death penalty," i.e., but for a constitutional error, he would not have been legally eligible for a sentence of death, *see Sawyer v. Whitley*, 505 U.S. 333, 335 (1992). The penalty phase evidence showed that Buck had a history of domestic violence, including, threatening his ex-girlfriend with a gun, shot his own sister during the rampage that resulted in the murders of Gardner and Butler, murdered Gardner in front of her children, showed no remorse for the murders, and laughed when asked about the murders. The Court found that the evidence presented was sufficient for the jury to conclude that Buck posed a future danger and was therefore eligible for a sentence of death.

A. Rule 60(b)

Rule 60(b)(6) provides for relief from a judgment for "any . . . reason that justifies relief." This Court can consider the motion if it "attacks, not the substance of the federal court's resolution [of Buck's habeas corpus petition] on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545

U.S. 524, 532 (2005). Relief under Rule 60(b) is available only if the case presents "extraordinary circumstances." *Id.* at 536.

Generally speaking, a "change in decisional law after entry of judgment does not constitute extraordinary circumstances" and is not alone a ground for relief from a final judgment under Rule 60(b)(6). *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (internal quotation marks and citation omitted). *Adams* specifically rejected the argument that *Martinez*, standing alone, constitutes "extraordinary circumstances" justifying relief under Rule 60(b)(6). *Id.* at 320. Buck argues that his case does present extraordinary circumstances because of the nature of Quijano's testimony, the fact that the claims have never been addressed on the merits by a reviewing court due to procedural bars, and the Texas Attorney General's decision not to raise procedural defenses in cases that Buck claims are similar.

As previously addressed in this Court's memorandum and order denying Buck's petition, Quijano's testimony on direct examination in this case noted the fact that African-Americans and Latinos are over-represented in the penal system. On cross examination, Quijano answered "yes" when asked: "You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?" 28 Tr. at 160. Buck challenged this testimony solicited on cross examination, but the Fifth Circuit has previously rejected his claim that

his case is similarly situated to the other cases in which Quijano testified.

> Citing a line of cases in which Texas has conceded error and waived procedural default after the *prosecution* had introduced Dr. Quijano as an expert witness during the penalty phase, Buck contends that notions of "intra-court comity" compel us to conclude that the State must also waive procedural default in the instant case. Buck's case, however, differs markedly from, e.g., *Saldano v. Roach*, [363 F.3d 545 (5th Cir. 2004),] in which the prosecution introduced Dr. Quijano as an expert witness and then proceeded to question him as to how the defendant's race might serve as a predictor of future dangerousness. In *Saldano*, the State conceded its error and waived any procedural bar that otherwise might have precluded our review of the defendant's claim on the merits. Here, in contrast, the State has not conceded any error or waived its procedural bar. Rather, the State has consistently maintained that it did not violate Buck's constitutional rights merely by questioning Buck's own witness — without objection from Buck — on the very same issues first discussed by that witness during direct examination by the defense, a classic example of the defense "opening the door" for the prosecutor to pursue the subject. Because Buck's characterization of "intra-court comity" finds no support in our precedent, we decline to

> apply here concessions made by the State in a different case with different facts. Such a broad expansion of a party's case-specific concession would not only contravene our precedent, but would also discourage the State from conceding error when it seeks to correct its own mistakes — both of which are clearly undesirable results.

Buck v. Thaler, 345 Fed. App'x 923, 929 (5th Cir. 2009) (footnotes omitted). The Fifth Circuit has found that Buck's case is different in critical respects from the cases in which Texas confessed error.

Finally, Buck's argument that this Court should grant relief because no court has yet reviewed the merits of his ineffective assistance of counsel claims is circular. Procedural bars prevent courts from reviewing claims on the merits. Buck's claim is procedurally defaulted. Therefore, the claim has not been reviewed on the merits. Buck suggests that the fact that the claims are defaulted should constitute extraordinary circumstances excusing the default. Other than citing *Martinez*, however, Buck has failed to demonstrate that this case presents extraordinary circumstances. While the introduction of any mention of race was ill-advised at best and repugnant at worst, it was, in this case, *de minimis*. As respondent points out, there were two references to race in Dr. Quijano's testimony. On direct examination, Quijano stated the indisputable fact that African-Americans and Latinos are over-represented in the criminal justice system. On cross examination, Dr. Quijano answered affirmatively when questioned about earlier findings he had made that being

black is one statistical factor he considered in reaching his conclusion. The prosecutor did not make any race-based argument in closing. Moreover, the State's confession of error in other cases does not create any legally enforceable rights, nor does equity demand that the confession of error be extended to Buck's case for the reasons stated by the Fifth Circuit and quoted above. Finally, the fact that his claims have not been reviewed on the merits is a result of the fact that they were procedurally defaulted. If that constituted "extraordinary circumstances," then the change in decisional law represented by *Martinez*, would, by itself, provide grounds for relief under Rule 60(b). As noted above, both the Supreme Court and the Fifth Circuit have held otherwise. *See Gonzalez*, 545 U.S. at 531-32; *Adams*, 679 F.3d at319 [sic].

B. Ineffective Assistance of Counsel

Assuming without finding that Buck has demonstrated that his case presented "extraordinary circumstances," he would not be entitled to relief on the merits of his claim. In *Martinez*, the Supreme Court carved out a narrow equitable exception to the rule that a federal habeas court cannot consider a procedurally defaulted claim of ineffective assistance of counsel.

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim . where appointed counsel in the initial-review collateral proceeding was

> ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

Martinez v. Ryan, 132 S.Ct. 1309, 1318-19 (2012).

To prevail on a claim for ineffective assistance of counsel, Petitioner

> must show that . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to prevail on the first prong of the *Strickland* test, Petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Reasonableness is measured against prevailing professional norms, and must be viewed under the totality of the circumstances. *Id.* at 688. Review of counsel's performance is deferential. *Id.* at 689.

In the context of a capital sentencing proceeding, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, [466] U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

During the penalty phase, the State presented evidence of Buck's prior convictions for delivery of cocaine, possession of a controlled substance, and unlawfully carrying a weapon. 28 Tr. at 5-28, 239-43. The State also presented testimony from Buck's former girlfriend recounting acts of domestic violence, including one instance in which Buck threatened her with a gun. *Id.* at 31-40.

In addition to Buck's past history, the jury was aware of the horrific facts of Buck's murder of Gardner and Butler. These included Buck's attempt to murder his own sister, and his murder of Gardner in front of her two children. The jury also heard that Buck was laughing about the murders when he was arrested, and that he said about Gardner that "the bitch deserved what she got." *Id.* at 50-51.

Buck called several witnesses who knew him and testified that he was not violent. *See* 28 tr. at 77, 84-85, 96. He also called two expert witnesses: Dr. Quijano and Dr. Patrick Lawrence. Quijano was the former chief psychologist for TDCJ, *id.* at 101-02, and Lawrence was a

psychologist specializing in prediction of future criminal behavior, *id.* at 177, 182-85.

Buck's counsel offered testimony that Quijano was neutral, emphasizing his experience working for TDCJ, *id.* at 101-04, and eliciting the fact that Quijano had testified for both defendants and the State in the past. *Id.* at 104-05. Quijano offered his opinion that Buck was not a future danger. *Id.* at 115. He based his conclusion, in part, on "several statistical factors . . . including, but not limited to age, sex, race, social economics, history of violence, and history of substance abuse." *Buck v. Thaler*, 345 Fed. App'x at 925. Included in Quijano's testimony was his observation that African-Americans and Latinos are over-represented in the criminal justice system. 28 Tr. at 111.

Nevertheless, the Court finds that counsel's representation fell below an objective standard of reasonableness under the first prong of *Strickland*. *See Strickland*, 466 U.S. at 687-88. Buck's trial counsel called Dr. Quijano as a witness even though he knew that Dr. Quijano had previously testified on the direct correlation between race and future dangerousness. Additionally, Buck's counsel had received Dr. Quijano's expert report before trial clearly stating that Buck's race made him statistically more likely to be a future danger. *Buck v. Thaler*, __ U.S. __, 132 S. Ct. 32, 33 (2011). Despite the longstanding "'unceasing efforts' to eradicate racial prejudice from our criminal justice system," *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987), Buck's counsel called Dr. Quijano as a witness and relied on his expert report,

although counsel was fully aware of Dr. Quijano's inflammatory opinions about race. There was no strategic reason to do so because Buck's counsel offered a second expert at trial, Dr. Lawrence, who had no history of this kind of troubling race-based testimony. Testimony like that of Dr. Quijano lends credence to any potential latent racial prejudice held by the jury. *Cf. Guerra v. Collins*, 916 F. Supp. 620, 636 (S.D. Tex. 1995), *aff'd sub nom. Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1996) (holding that a defendant is "entitled to have his punishment assessed by the jury based on consideration of the mitigating and aggravating circumstances concerning his personal actions and intentions, not those of a group of people with whom he shared a characteristic."). Buck's counsel recklessly exposed his client to the risks of racial prejudice and introduced testimony that was contrary to his client's interests. His performance fell below an objective standard of reasonableness, and the Court therefore finds that trial counsel's performance was constitutionally deficient.

However, the Court finds that under the facts of this case, Buck cannot show that he was prejudiced by his counsel's constitutionally deficient action. In light of the aggravating evidence, particularly the facts of the crime and Buck's actions following the murders, it cannot be said that there is a reasonable probability that the outcome would have been different if Quijano had made no reference to race. Although counsel rendered deficient performance by calling Quijano as a witness, Buck suffered no *Strickland* prejudice as a result. Therefore, the Court finds that Petitioner has not established a claim of ineffective assistance of trial counsel on this issue.

Buck also contends that his counsel was ineffective for failing to object when the State asked Quijano a question about the issue of Buck's race. As the Fifth Circuit noted, Buck opened the door to this question. *See Buck v. Thaler*, 345 Fed. App'x at 930. Because Buck opened the door, any objection to the prosecutor's question would have been futile. "This Court has made clear that counsel is not required to make futile motions or objections." *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990). Counsel was not ineffective for failing to make a futile objection.

Assuming without deciding, however, that the prosecutor's question amounted to constitutional error, Buck cannot prove prejudice. As previously discussed, the evidence showed that Buck had a prior criminal history and was violent toward his ex-girlfriend. He committed a brutal double murder, killing one of the victims in front of her two young children, and shot his own sister in the chest. Under these facts, there is no reasonable probability that the outcome of the sentencing phase would have been different if counsel objected to the prosecutor's question.

C. Certificate of Appealability

Although Buck has not requested a certificate of appealability ("COA"), the court may nevertheless determine whether he is entitled to this relief in light of the court's rulings. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny a COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate

of appealability having been issued."). A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does."). "A plain reading of the AEDPA compels the conclusion that COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone." *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997). A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). The Supreme Court has stated that

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253[(c)] is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where the district court dismisses the

> petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). "[T]he determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134 (2001).

This Court concludes that Buck has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and that jurists of reason would not find it debatable whether this court is correct in its procedural determinations. Therefore, Buck is not entitled to a COA.

D. Conclusion

For the foregoing reasons, Buck's renewed motion for relief from the judgment (Inst. # 49) is denied.

III. Order

For the foregoing reasons, IT IS ORDERED THAT Buck's Motion For Relief From Judgment (Docket Entry 49) is **Denied;** and

IT IS FURTHER ORDERED THAT no certificate of appealability shall issue. SO ORDERED.

SIGNED at Houston, Texas, on this 29th day of August, 2014.

/s/ Vanessa Gilmore
VANESSA GILMORE
United States District Judge

OPINION OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (HOUSTON DIVISION) DENYING PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO FRCP 59(E), MARCH 11, 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

H-04-3965

DUANE EDWARD BUCK,

Petitioner,

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE-CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

March 11, 2015, Decided
March 11, 2015, Filed

ORDER

Duane Edward Buck is a Texas death row inmate. On July 24, 2006, this Court denied his petition for a writ of habeas corpus. Among the claims denied were Buck's claims that he received ineffective assistance of counsel

when his counsel called as an expert witness Dr. Walter Quijano, who mentioned an issue relating to race during the penalty phase of Buck's trial. Buck further contended that counsel was ineffective for failing to object when the prosecutor asked Dr. Quijano a question raising a racial issue on cross-examination. This Court found that those claims were procedurally defaulted, and the Fifth Circuit denied Buck's request for a certificate of appealability. *See Buck v. Thaler*, 345 Fed. App'x 923 (5th Cir., 2009).

In 2012, the Supreme Court issued its decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), holding that ineffective assistance of state habeas counsel could, in certain circumstances, constitute cause to excuse a procedural default of an ineffective assistance of trial counsel claim. In *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), the Supreme Court held that *Martinez* is applicable to the Texas capital postconviction process. On January 7, 2014, Buck, relying on *Martinez* and *Trevino*, filed a motion for relief from the judgment of this Court under Rule 60(b)(6) of the Federal Rules of Civil Procedure (Inst. # 49). This Court denied that motion on August 29, 2014.

On September 26, 2014, Buck filed a motion to alter or amend judgment (Inst. # 67). For the reasons stated below, the motion is denied.

A motion to alter or amend under Fed.R.Civ.P. 59(e) "must clearly establish either a manifest error of law or must present newly discovered evidence." *Schiller v. Physicians Resource Grp., Inc.*, 342 F.3d 563, 567 (5th Cir. 2003)(internal quotation marks omitted). "Relief under

Rule 59(e) is also appropriate where there has been an intervening change in controlling law." *Id.*

Buck contends that, in denying relief on his Rule 60 motion, this Court "improperly excluded from its consideration significant evidence...." Motion to Alter or Amend (Inst. # 67) at 2. This assertion misrepresents the Court's opinion, which carefully considered all of Buck's argument and the entire record in this case.

This Court based the denial on the Court's extensive knowledge and re-review of the record in this case and independent review of relevant case law. Based on the record and controlling law, the Court concluded that Buck was not entitled to relief. The specific reasons for the denial of Buck's Rule 60 motion are explained in detail in the 18 page order denying that motion.

Contrary to the assertions in Buck's motion, this Court specifically addressed Buck's arguments that his case presents "extraordinary circumstances" justifying relief, both in the text of the order denying his most recent Rule 60(b) motion, *See* August 29, 2014, Memorandum and Order (Inst. # 66) at 8-10, and by reference to other orders and opinions addressing these arguments, *see id.* at 8. Buck cites no new law in support of his argument and, aside from his wholly inaccurate assertion that this Court excluded evidence from its consideration, merely expresses his disagreement with the Court's analysis and conclusion. That disagreement does not demonstrate a manifest error of law, present newly discovered evidence, or rely on an intervening change in controlling law. It therefore does not provide grounds for relief.

This Court also found that, while Buck's counsel rendered deficient performance, Buck did not demonstrate that he was prejudiced by that deficient performance. Because of this, Buck failed to demonstrate that he presented a substantial underlying claim of ineffective assistance of counsel, and therefore could not overcome his procedural default under *Martinez*. Buck now argues that this Court's prejudice analysis was wrong.

Once again, Buck's argument boils down to mere disagreement with this Court's analysis. While Buck cites a few cases in which a court found that a defendant was prejudiced by counsel's deficient performance in a capital sentencing proceeding despite evidence of a heinous crime, he cannot dispute that this analysis must be highly fact-specific. As discussed in detail in this Court's prior order, while counsel was deficient for calling Dr. Walter Quijano as an expert witness, any harm caused by his objectionable testimony was *de minimis* in light of, among other things: 1) the extremely limited scope of that testimony; 2) the fact that the prosecution did not refer to the objectionable testimony in closing argument; 3) the facts of Buck's crime, including the fact that he murdered one of his victims in front of her young children as the victim begged for her life; and 4) Buck's lack of remorse. Once again, Buck's argument comes down to the fact that he disagrees with this Court's conclusion that counsel's deficient performance did not, in light of the entire record, raise a reasonable probability that the outcome of the sentencing hearing would have been different had counsel not called Dr. Quijano to testify. *See Strickland v. Washington*, 466 U.S. 668, 694-95 (1984). As discussed above, Buck's

disagreement with this Court's analysis does not provide a basis for relief under Rule 59.

Moreover, because this Court's finding that Buck is not entitled to relief is not debatable among jurists of reason, Buck is not entitled to a certificate of appealability from this Order. *See Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). For the foregoing reasons,

IT IS ORDERED THAT Buck's Motion to Alter or Amend Judgment (Inst. # 67) is **Denied**; and

IT IS FURTHER ORDERED THAT no certificate of appealability shall issue. SO ORDERED.

SIGNED at Houston, Texas, on this 11th day of March, 2015.

/s/ Vanessa Gilmore
VANESSA GILMORE
United States District Judge

OPINION OF THE FIFTH CIRCUIT RE: PETITIONER'S MOTION FOR A CERTIFICATE OF APPEALABILITY, AUGUST 20, 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[COURT STAMP OMITTED]

No. 14-70030

DUANE EDWARD BUCK,

Petitioner—Appellant,

versus

WILLIAM STEPHENS, Director,
Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent—Appellee.

Appeals from the United States District Court
for the Southern District of Texas.
USDC No. 4:04-CV-3965.

Before SMITH, OWEN, and HAYNES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Duane Buck seeks a certificate of appealability ("COA") to challenge the denial of his motion for reconsideration, in which he sought to raise ineffective assistance of counsel ("IAC") in seeking federal habeas corpus relief. Because he has not shown extraordinary circumstances that would permit relief under Federal Rule of Civil Procedure 60(b)(6), we deny the application for a COA.

I.

This is Buck's third trip to the Fifth Circuit. More detailed explanations of the facts and procedural history can be found in *Buck v. Thaler*, 345 F. App'x 923 (5th Cir. 2009) (per curiam), and *Buck v. Thaler*, 452 F. App'x 423 (5th Cir. 2011) (per curiam). We recite only what is relevant to this request for a COA.

In July 1995, Buck murdered his ex-girlfriend Debra Gardner and her friend Kenneth Butler. Buck was arrested at the scene, and police found the murder weapons in the trunk of his car. Two witnesses identified him as the shooter. Buck laughed during and after the arrest and stated to one officer that "[t]he bitch got what she deserved."

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Buck was convicted of capital murder for the deaths. During the penalty phase, the state presented evidence that Buck would likely remain dangerous. That evidence included his criminal history, his violent conduct, and his demeanor during and after the arrest.

Buck called Dr. Walter Quijano, a clinical psychologist, as an expert witness to testify regarding future dangerousness. Buck's lawyer asked Quijano what factors he would look at to determine whether an inmate would engage in future acts of violence. Quijano explained several, including age, sex, race, social economics, and substance abuse. For example, he testified that advanced age and increased wealth correlated with a decline in the likelihood of committing future violent acts. On race, he gave a one-sentence explanation: "It's a sad commentary that minorities, Hispanics and black people, are over represented in the Criminal Justice System." That matched a statement included in Quijano's expert report, which was introduced as evidence.

During cross-examination, the prosecution elicited one more comment on race from Quijano: Question: "You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?" Answer: "Yes." During closing arguments, the prosecution referenced Quijano's testimony generally and specifically noted that he had said that, although Buck was in the low range for a probability of committing future violent acts, the probability did exist. The prosecution did not reference Buck's race or Quijano's use of race.

The jury unanimously found beyond a reasonable doubt that there was a probability Buck would commit criminal acts of violence that would be a continuing threat to society. It further found that there were not sufficient mitigating circumstances to justify a life sentence. The court sentenced Buck to death, and the Texas Court of Criminal Appeals ("TCCA") affirmed.

Buck filed his first state habeas application in 1997; it contained no IAC claim or any other challenge based on Quijano's testimony. In 2000, however, the Texas Attorney General ("AG") admitted to the Supreme Court in *Saldano v. Texas*, 530 U.S. 1212 (2000), that the state had erred in calling Quijano as a witness and having him testify that the defendant's race increased the likelihood of future dangerousness. Shortly after the Court vacated and remanded *Saldano* on that confession of error, the AG publicly identified eight other cases involving racial testimony by Quijano, six of which the AG said were similar to Saldano's case; one of those was Buck's. Buck contends that Texas "promised to concede constitutional error and waive its procedural defenses" in his case so that he could get resentenced without the race-related testimony.[1]

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1. It has never been established that the AG's office promised not to raise procedural defenses in Buck's case. The record contains a news release by the AG's office stating that a post-*Saldano* audit had revealed "eight more cases in which testimony was offered by Dr. Quijano that race should be a factor for the jury to consider in making its determination about the sentence in a capital murder trial," of which six were similar to *Saldano*. The same release stated that the AG's office "sent letters to opposing counsel and to the local

In 2002, while his first state habeas petition was pending, Buck filed a second petition that challenged Quijano's testimony on several grounds, including IAC. The TCCA ultimately denied the first habeas petition and dismissed the second as an abuse of the writ.

In 2004, Buck filed a federal habeas petition raising a litany of challenges to his sentence, including IAC. The court denied relief on that claim because Buck had not raised IAC on direct appeal or in his original state habeas petition. He had raised it in his second state habeas petition, but the TCCA dismissed it as an abuse of the writ, so it was procedurally defaulted. Buck sought a COA from this court on only one issue: "Was he deprived of due process or equal protection by the prosecution's reference to testimony from Buck's own penalty-phase expert witness . . . ?" *Buck*, 345 F. App'x at 924. We concluded that the claim was procedurally barred and meritless. *Id.* at 930.

After the state set an execution date of September 15, 2011, Buck moved for relief from the earlier district-court judgment under Federal Rule of Civil Procedure 60(b)(6), claiming that the state's failure to admit error and waive defenses was extraordinary and merited relief. The motion also asked for relief under Rule 60(d)(3), alleging that the AG had committed fraud on the court.

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prosecutors involved advising them of [the AG's] investigation." But we have found no statement by the AG in the record in which he confessed error relating to Buck's case and promised not to raise procedural defenses.

The district court denied the motion and, three days later, Buck filed a motion to amend the judgment under Rule 59(e), claiming that the AG had made material misrepresentations and omissions in opposing the earlier motion for relief. The court denied that motion as well. We declined to permit a successive habeas petition or issue a COA. *Buck*, 452 F. App'x at 433.

The Supreme Court stayed Buck's execution to consider his petition for writ of certiorari. It ultimately denied the petition, accompanied by a statement respecting that denial and a dissent. *Buck v. Thaler*, 132 S. Ct. 32, 32-35 (2011) (Alito, J., respecting the denial of certiorari); *id.* at 35-38 (Sotomayor, J., dissenting from the denial of certiorari).

In 2013, Buck filed another state habeas petition. The trial court concluded that it was a subsequent petition and referred it to the TCCA. While that petition was pending, the Supreme Court decided *Trevino v. Thaler*, 133 S.

The record contains a *Houston Chronicle* article from 2000 that paraphrases the AG's spokesperson as saying, "If the attorneys amend their appeals currently pending in federal court to include objections to Quijano's testimony, the attorney general will not object." The spokesperson is quoted as representing that cases still with the district attorney's offices "will be handled in a similar manner as the Saldano case." A *New York Times* article went further, stating, "[The AG's] staff has notified defense lawyers representing the six inmates that his office will not object if they seek to overturn the death sentences based on Mr. Quijano's testimony." Because it does not change the outcome of this appeal, we need not explore whether such a promise was made or how explicit it was.

Ct. 1911 (2013), holding that Texas's procedural regime rendered it almost impossible to raise IAC claims on direct appeal, making the scheme similar to the one in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). The Court therefore held that the *Martinez* exception applied in Texas: The lack of effective counsel during initial state collateral-review proceedings could excuse a procedural default on an IAC claim. *Trevino*, 133 S. Ct. at 1921.

The TCCA dismissed the petition as an abuse of the writ. *Ex parte Buck*, 418 S.W.3d 98 (Tex. Crim. App. 2013). Three judges dissented, concluding that Buck had made out a potentially meritorious case of IAC relating to his attorney's alleged failure adequately to investigate and present mitigating evidence. *Id.* at 98-114 (Alcala, J., dissenting).

In January 2014, Buck again filed for Rule 60(b)(6) relief from judgment in his federal habeas case. He focused solely on his IAC claim, contending that counsel was ineffective for introducing Quijano and that his case was sufficiently extraordinary to justify relief under Rule 60(b)(6). The district court denied the motion, holding that Buck's case did not have the extraordinary circumstances required for Rule 60(b)(6). It also held that Buck had failed to make out an IAC claim, establishing deficient performance but not prejudice. Within a month of that denial, Buck again moved for relief under Rule 60(b)(6), essentially disagreeing with the district court's disposition of the issues. On March 11, 2015, the district court denied that motion as well and declined to issue a COA.

II.

To obtain a COA, Buck must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). On application for a COA, we engage in "an overview of the claims in the habeas petition and a general assessment of their merits" but do not engage in "a full consideration of the factual or legal bases adduced in support of the claims," asking only whether the district court's resolution of the claim "was debatable among jurists of reason." *Miller-El*, 537 U.S. at 322.

The district court denied the motion for a procedural reason, namely, Buck's failure to show extraordinary circumstances justifying relief under Rule 60(b)(6). We therefore must deny a COA if Buck fails to establish both (1) that jurists of reason would find debatable "whether the petition states a valid claim of the denial of a constitutional right" and (2) that those jurists "would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, [529] U.S. 473, 484 (2000).

III.

Regarding the procedural bar, for a Rule 60(b)(6) motion in this posture not to be itself a successive habeas petition, the litigant "must not be challenging a prior merits-based ruling." *Balentine v. Thaler*, 626 F.3d 842, 846 (5th Cir. 2010). Instead, he must be challenging a previous ruling—such as procedural default or a statute-of-limitations bar—that precluded a merits determination.

Id. at 846-47. The district court initially denied Buck's IAC claim because the TCCA's abuse-of-the-writ dismissal was an adequate and independent state ground for denying relief, so Buck's motion satisfies that requirement.

To obtain relief under Rule 60(b)(6), Buck must show "extraordinary circumstances," *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005), which "will rarely occur in the habeas context," *id.* at 535. There is little guidance as to what constitutes "extraordinary circumstances," but we have recognized that a change in a decisional law does not qualify, and we have cited with approval district-court decisions holding other circumstances not extraordinary as well, including IAC. *See Williams v. Thaler*, 602 F.3d 291, 312 (5th Cir. 2010).

Buck contends that eight equitable factors from *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396 (5th Cir. Unit A Jan. 1981), are the proper means for evaluating a Rule 60(b) motion in a habeas case.[2] We have declined to

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2. Those factors are "(1) [t]hat final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether if the judgment was a default or a dismissal in which there was no consideration of the merits the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether if the judgment was rendered after a trial on the merits the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack." *Seven Elves*, 635 F.2d at 402.

answer whether *Seven Elves* sets the standard for a Rule 60(b)(6) motion in habeas proceedings. *See Diaz v. Stephens*, 731 F.3d 370, 376-77 (5th Cir. 2013). We need not answer it now because Buck has not made out even a minimal showing that his case is exceptional.

The January 2014 motion contains eleven facts, reurged in the COA application, that Buck says make the case extraordinary:

1. Mr. Buck's trial attorney knowingly presented expert testimony to the sentencing jury that Mr. Buck's race made him more likely to be a future danger;

2. Although required to act as gate-keeper to prevent unreliable expert opinions from reaching and influencing a jury, see Tex. R. Evid. 705(c); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992), the trial court qualified Dr. Quijano as an expert on predictions of future dangerousness, allowed him to present race based opinion testimony to Mr. Buck's capital sentencing jury, and admitted Dr. Quijano's excludable hearsay report linking race to dangerousness;

3. The trial prosecutor intentionally elicited Dr. Quijano's testimony that Mr. Buck's race made him more likely to be a future danger on cross-examination, vouched for him as an "expert" in closing, and asked the jury to rely on Dr. Quijano's testimony to answer the future dangerousness special issue in the State's favor;

4. Mr. Buck's state habeas counsel did not challenge trial counsel's introduction of this false and offensive testimony — or Texas's reliance on it — in Mr. Buck's initial state habeas application;

5. The Texas Attorney General conceded constitutional error in Mr. Buck's case and promised to ensure that he received a new sentencing, but reneged on that promise after deciding that the introduction of the offensive testimony was trial counsel's fault;

6. This Court ruled that federal review of Mr. Buck's trial counsel ineffectiveness claim was foreclosed by state habeas counsel's failure to raise and litigate the issue in Mr. Buck's initial state habeas petition, relying on *Coleman*, which has subsequently been modified by *Martinez* and *Trevino*;

7. The Fifth Circuit held Mr. Buck's trial counsel responsible for the introduction of Dr. Quijano's testimony linking Mr. Buck's race to his likelihood of future dangerousness;

8. Three Supreme Court Justices concluded that trial counsel was at fault for the introduction of Dr. Quijano's testimony;

9. Three Judges of the CCA found that "because [Mr. Buck's] initial habeas counsel failed to include any claims related to Quijano's testimony

> in his original [state habeas] application, no court, state or federal, has ever considered the merits of those claims," *Buck*, 2013 WL 6081001, at *5;
>
> 10. Mr. Buck's case is the only one in which Texas has broken its promise to waive procedural defenses and concede error, leaving Mr. Buck as the only individual in Texas facing execution without having been afforded a fair and unbiased sentencing hearing; and
>
> 11. Martinez and Trevino now allow for federal court review of "substantial" defaulted claims of trial counsel ineffectiveness.

Initial examination of those facts reveals that they are not extraordinary at all in the habeas context. Numbers 1-3, 7, and 8 are just variations on the merits of Buck's IAC claim, which is at least unremarkable as far as IAC claims go. Buck's IAC claim is not so different in kind or degree from other disagreements over trial strategy between lawyer and client that it counts as an exceptional case. Nor are IAC claims as a class extraordinary under Rule 60(b)(6). The Court warned in *Gonzalez*, 545 U.S. at 536, that extraordinary circumstances will rarely be present in the habeas context.

The fourth and ninth extraordinary facts merely point out that Buck's IAC claim was procedurally defaulted and did not get a merits determination. That is not an extraordinary circumstance in the habeas context; it is the nature of procedural defaults that many potentially

viable claims will never advance to a merits determination. No jurists of reason would expand the definition of "extraordinary" to reach all procedurally defaulted IAC claims.

The sixth and eleventh facts relate to Buck's notion that *Trevino* and *Martinez* changed the law regarding procedural defaults in IAC claims in a way that could have excused his procedural default. *Martinez*, however, "was simply a change in decisional law" that is not an extraordinary circumstance under Rule 60(b)(6), and "*Trevino*'s recent application of *Martinez* to Texas cases does not change that conclusion in any way." *Diaz*, 731 F.3d at 376 (internal quotation marks omitted).

Those facts plainly fail to make even a plausible argument that Buck's is the extraordinary case that satisfies Rule 60(b)(6). He has repeatedly asserted, however, that his case is special because of the *Saldano*-related statements by the AG. Buck contends the AG conceded that Quijano's testimony was unconstitutional but reneged on a promise to resentence Buck (fact five), despite Texas's following through in other cases involving Quijano (fact ten).

Even if the AG initially indicated to Buck that he would be resentenced—a fact that has never been adequately established, *see* note 1, *supra*—his decision not to follow through is not extraordinary. The broken-promise element to this case makes it odd and factually unusual, but extraordinary circumstances are not merely found on the spectrum of common circumstances to unique circumstances. And they must be extraordinary circumstances "justifying relief from the judgment."

Gonzalez, 545 U.S. at 537. Buck has not shown why the alleged reneging would justify relief from the judgment. For example, he has not shown that he relied on the alleged promise to his detriment.

Nor is it extraordinary that the AG confessed error and waived procedural bars in other cases and not in Buck's. We have previously rejected the notion that some concept of "intra-court comity" requires the state to waive procedural defenses in similar cases. *See Buck*, 345 F. App'x at 929. Even assuming *arguendo* that the other cases at issue are materially similar to Buck's (which the state disputes), it can hardly be extraordinary that the state chose different litigation strategies between the two cases. Jurists of reason would not debate that Buck has failed to show extraordinary circumstances justifying relief.

Buck has not demonstrated that jurists of reason would debate whether his case is exceptional under Rule 60(b)(6). The request for a COA is DENIED.

[CERTIFICATION AND SEAL OMITTED]

OPINION OF THE FIFTH CIRCUIT EN BANC RE: PETITIONER'S MOTION FOR A CERTIFICATE OF APPEALABILITY, NOVEMBER 6, 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[COURT STAMP OMITTED]

No. 14-70030

DUANE EDWARD BUCK,

Petitioner—Appellant,

versus

WILLIAM STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent—Appellee.

Appeals from the United States District Court for the Southern District of Texas.

ON PETITION FOR REHEARING EN BANC
(Opinion August 20, 2015, U.S. App. LEXIS 14755)

Before SMITH, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

In the en banc poll, 2 judges voted in favor of rehearing (Judges Dennis and Graves), and 13 judges voted against rehearing (Chief Judge Stewart and Judges Jolly, Davis, Jones, Smith, Clement, Prado, Owen, Elrod, Southwick, Haynes, Higginson, and Costa).

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

JAMES L. DENNIS, Circuit Judge, with whom GRAVES, Circuit Judge, joins, dissenting:

In *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003), the Supreme Court held that the threshold inquiry required by 28 U.S.C. § 2253(c):

> does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

In my view, the panel in this case, perhaps unintentionally, followed that prohibited side-stepping process by justifying its denial of a COA based on its adjudication of the actual merits. This is not the first time that a panel of this court has flouted *Miller-El*'s clear command when denying a COA: our court's "troubling" habit of evaluating the merits of petitioners' claims has been noted by three Supreme Court justices. *See Jordan v. Fisher*, 135 S. Ct. 2647, 2652 n.2 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari). Because I believe that Buck has made the requisite threshold showing of entitlement to relief, I respectfully dissent from the refusal to rehear his case en banc.

Duane Buck, a capital prisoner, seeks to raise ineffective assistance of counsel in federal habeas corpus

proceedings. His habeas petition was denied by the district court as procedurally barred. Buck has now applied to this court for a COA to challenge the district court's denial of his second motion for relief from judgment under Rule 60 of the Federal Rules of Civil Procedure, in which he alleged that extraordinary circumstances warrant reopening the proceedings. Under *Slack v. McDaniel*, [529] U.S. 473, 484 (2000), a COA should issue in Buck's case if he shows (1) that jurists of reason would find debatable "whether the petition states a valid claim of the denial of a constitutional right" and (2) that those jurists "would find it debatable whether the district court was correct in its procedural ruling." Yet the panel denied Buck's application on the grounds that "he has not shown extraordinary circumstances that would permit relief under Federal Rule of Civil Procedure 60(b)(6)." *Buck v. Stephens*, Slip Op. at 1 (Aug. 20, 2015). By ruling on the merits, the panel contravened the Supreme Court's clear commands and improperly denied Buck his right to appeal.

In *Miller-El*, the Supreme Court reiterated that, when evaluating a COA application, "the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims." 537 U.S. at 326. A petitioner is not required to demonstrate that he is entitled to relief; in fact, "[i]t is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief." *Id.* at 337. Rather, a petitioner satisfies the *Slack* standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327 (emphasis added). Furthermore, under this court's established precedent, "any doubt as to whether a COA should issue in a death-penalty case must be resolved in favor of the petitioner." *Pippin v. Dretke*,

434 F.3d 782, 787 (5th Cir. 2005) (citing *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004) (per curiam); *Newton v. Dretke*, 371 F.3d 250, 254 (5th Cir. 2004)).

In his application, Buck presented eleven factors that, when considered together, he believes demonstrate that his case involved extraordinary circumstances. Rather than consider whether reasonable jurists could disagree with the district court and conclude that Buck's allegations "set up an extraordinary situation," *Ackermann v. United States*, 340 U.S. 193, 199 (1950), the panel went through the factors one by one and determined that each was "not extraordinary." *Buck*, Slip Op. at 9-10. At the end of this flawed analysis of the merits of Buck's claims, the panel conclusorily declared: "Jurists of reason would not debate that Buck has failed to show extraordinary circumstances justifying relief." *Id.* at 10. This analysis would not be sufficient even if the court were properly considering the merits of Buck's claims: like the "dismissive and strained interpretation" of a petitioner's evidence that was rejected by the Supreme Court first in *Miller-El*, 537 U.S. at 344, and then again in *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005), the panel "dismisses, miscasts, and minimizes [Buck's] evidence, diluting its full weight by disaggregating it and focusing the inquiry on determining whether each isolated piece of evidence, taken alone,"[1] proves extraordinary circumstances. This mischaracterization is still more deficient at this stage in the proceedings, where it is employed to aid the panel in "deciding [Buck's] appeal without jurisdiction." *Miller-El*, 537 U.S. at 326-27.

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1. Brief of the NAACP LDF, et al., as *Amici Curiae* at 3, *Miller-El v. Dretke*, 545 U.S. 231 (No. 03-9659) 2004 WL 1942171, at *3.

"[P]roving his claim was not [Buck's] burden." *Jordan*, 135 S. Ct. at 2652. A proper, threshold inquiry into Buck's claim would have revealed that reasonable jurists could disagree with the district court's conclusions. Buck asserts that he faces execution based on a capital sentencing proceeding whose reliability was fundamentally compromised by the race-based testimony of Dr. Walter Quijano. He asserts that the State of Texas identified his case as one of six that was "similar" to that of Victor Hugo Saldaño, in which the State admitted that Dr. Quijano's testimony and the resulting "infusion of race as a factor for the jury to weigh in making its determination violated [Mr. Saldaño's] constitutional right to be sentenced without regard to the color of his skin." State's Resp. to Pet. for Cert, at 8, *Saldano v. Texas*, U.S. Supreme Court, No. 99-8119. He asserts that his is the only death sentence identified by the State that has not been overturned because his is the only case in which Dr. Quijano's participation in the trial was the result of the deficient performance of his own defense attorney. He asserts that the procedural default that barred his present claim should have been waived by the State pursuant to representations made by the Texas Attorney General. He asserts that, following the Supreme Court's decisions in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the same procedural default would not bar his claim if it were brought in federal court for the first time today. And he asserts that three judges on the Texas Court of Criminal Appeals dissented from the dismissal of his state habeas petition as procedurally barred, concluding that "[t]he record in this case reveals a chronicle of inadequate representation at every stage of the proceedings, the integrity of which is further called into question by the admission of racist and inflammatory testimony from an expert witness at the punishment phase" and that the procedural barrier should

therefore be abrogated. *Ex parte Buck*, 418 S.W.3d 98 (Tex. Crim. App. 2013) (Alcala, J., dissenting), *cert. denied sub nom. Buck v. Texas*, 134 S. Ct. 2663 (2014). While each of these factors might, on its own, be insufficient to warrant relief, together they describe a situation that is at least debatably "extraordinary."

That the issue is at least debatable is further illustrated by Justice Sotomayor's dissent from the denial of certiorari in *Buck v. Thaler*, 452 F App'x 423 (5th Cir. 2011), a previous iteration of this case. Justice Sotomayor—joined by Justice Kagan—concluded that, "[e]specially in light of the capital nature of this case and the express recognition by a Texas attorney general that the relevant testimony was inappropriately race-charged, Buck has presented issues that 'deserve encouragement to proceed further'" and a COA should therefore have been granted. *Buck v. Thaler*, 132 S. Ct. 32, 38 (2011) (quoting *Miller-El*, 537 U.S. at 327).

"Any doubt regarding whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination." *Newton*, 371 F.3d at 254 (5th Cir. 2004). In a case involving the severest of penalties, the panel's summary conclusion that "[j]urists of reason would not debate that Buck has failed to show extraordinary circumstances justifying relief" was both inappropriate and incorrect.

I respectfully dissent.

SALDAÑO V. TEXAS: RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, NO 99-8119

No. 99-8119

IN THE
SUPREME COURT OF THE UNITED STATES

VICTOR HUGO SALDANO,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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No. 99-8119

IN THE
SUPREME COURT OF THE UNITED STATES

VICTOR HUGO SALDANO,

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STATE OF TEXAS,

Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

**RESPONSE TO PETITION
FOR WRIT OF CERTIORARI**

Respondent, the State of Texas, files this response to Victor Hugo Saldano's petition for writ of certiorari and agrees that, under the record in this case, the prosecution's introduction of race during the penalty phase as a factor for determining "future dangerousness" constituted a

violation of Saldano's rights to equal protection and due process. Accordingly, Texas asks the Court to grant the petition, vacate the trial court's imposition of sentence on Saldano, and remand the case to the trial court with instructions that Saldano receive a new sentencing hearing in which race is not considered.[1]

STATEMENT OF THE CASE

I. Saldano's Crime

In 1996, the Petitioner, Victor Hugo Saldano, was convicted of capital murder in Collin County, Texas, for the murder of Paul Green.[2] The evidence presented at trial showed that Saldano and an accomplice used a handgun to kidnap Mr. Green, a forty-six year old man, from a grocery store parking lot.[3] The kidnaping occurred at 10:00 on a Saturday morning in the presence of witnesses.[4] Neither Saldano nor his accomplice knew Mr. Green, and the crime appears to have been random.[5]

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1. The jury's finding of Saldano's guilt is neither raised nor affected by this petition.

2. Pet. App. at 1.

3. Pet. App. at 7.

4. Pet. App. at 7.

5. 21 SF at 280. (Under the former Texas Rules in effect at the time of Saldano's trial, the "Statement of Facts" was the name used for the court reporter's recording of testimony which is more commonly known as the "transcript." Reference to the multi-volume Statement of Facts will be made as "_ SF at _".)

Mr. Green was forced into his car by Saldano, and while a gun was held to his head by the accomplice, Mr. Green was taken to a secluded spot on a country road.[6] Saldano forced Mr. Green into the woods while the accomplice waited at the car.[7] Once in the woods, Saldano fatally shot Mr. Green five times, including once in the head at point-blank range.[8] Saldano stole Mr. Green's wallet and watch.[9]

Saldano and his accomplice drove Mr. Green's car back toward town before abandoning it on the side of the highway.[10] A short time thereafter, Saldano and his accomplice were taken into custody.[11] Prior to his trial, Saldano told the jailer that he had shot Mr. Green four times, and then once in the head just to make sure he was dead.[12] Saldano said he felt nothing when he shot Mr. Green.[13]

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6. Pet. App. at 7.

7. Pet. App. at 7.

8. Pet. App. at 7; 14 SF at 233.

9. Pet. App. at 7.

10. Pet. App. at 8.

11. Pet. App. at 8.

12. Pet. App. at 8.

13. Pet. App. at 9.

II. The Admittance of Race as a Factor in Determining Future Dangerousness

In the penalty phase of Saldano's trial, the jury was charged with answering two questions regarding Saldano.[14] First, the jury was charged with finding beyond a reasonable doubt the probability that Saldano would commit criminal acts of violence that would constitute a continuing threat to society.[15] The jury was instructed that the burden of proving this "future dangerousness" lay solely on the prosecution.[16] Second, if the jury answered yes to the first question, the jury was instructed to answer whether, considering all of the evidence, including the circumstances of the offense, Saldano's character and background, and Saldano's personal moral culpability, there was a sufficient mitigating circumstance or circumstances to warrant the imposition of a life sentence rather than the death sentence.[17]

The jury was presented with more than enough evidence to warrant its finding of "future dangerousness." In fact, the Texas Court of Criminal Appeals previously ruled that there was, without reference to any testimony

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14. TR at 125. (Under the former Texas Rules in effect at the time of Saldano's trial, the "Transcript" was the name used for all pleadings and other court documents upon which the trial occurred. Reference to the transcript will be made as "TR at _".)

15. TR at 125.

16. TR at 120.

17. TR at 126.

elicited about race, sufficient evidence to warrant the finding of "future dangerousness," and Saldano does not seek review of that decision here.[18] This evidences includes the facts that: (1) the circumstances of Saldano's capital offense demonstrate that it was particularly random, callous, cruel, and bold; (2) Saldano expressed no remorse for the slaying of his victim and has even stated that he felt nothing at the time of the killing; (3) Saldano was engaged in an escalating series of criminal activities prior to the killing of his victim; and (4) Saldano's relatively young age.[19]

During the sentencing phase of Saldano's trial, the prosecution presented testimony on the issue of Saldano's future dangerousness,[20] including evidence that there were twenty-four factors to be weighed in determining future dangerousness, one of which was Saldano's race.[21] The witness testified that African-Americans and Hispanics are over-represented in prison compared to their percentage of the general population.[22] He explained that "race itself may not explain the over-representation, so there are other subrealities that may have to be considered."[23] Further, the witness testified

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18. Pet App. at 6-9.

19. Pet. App. at 6-9.

20. Pet. App. at 8; 20 SF at 62.

21. Pet. App. at 9-10.

22. Pet. App. at 9.

23. 20 SF at 76.

that because Saldano was from Argentina, he would be considered Hispanic.[24] As the Texas Court of Criminal Appeals recognized, the prosecution's witness "testified that because [Saldano] is Hispanic, this was a factor weighing in the favor of future dangerousness."[25] At the conclusion of the witness's direct testimony, the State admitted into evidence a series of exhibits consisting of flip-charts that listed each of the factors the jury was to weigh in determining future dangerousness.[26] The charts had marks next to each factor that was said to apply to Saldano, including race.[27]

Counsel for Saldano did not object to the introduction of testimony regarding race. Instead, defense counsel cross-examined regarding the reliability of the data and whether Saldano, as a Argentinian, fit within the category of Hispanic.[28] The witness did not have evidence of the studies with him, and they are not part of the record.[29]

On cross-examination, the witness further stated that he could not tell the jury how to weigh the factors he outlined, stating that they may all be of equal value, but

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24. 20 SF at 76.

25. Pet. App. at 9.

26. 20 SF at 108-09; 22 SF at Exhibits 116-18 (Attached as Tab A.)

27. *See* Tab A.

28. 20 SF at 114-31.

29. 20 SF at 115.

it was for the jury to decide while considering all of the factors.[30] Saldano's expert testified that the racial studies relied upon by the prosecution's witness only demonstrated a correlation between race and recidivism, and could not tell the jury anything about actual causation.[31] In fact, Saldano's expert testified that parts of the method were valid, but that they showed merely "some relationship here" and not "causation."[32]

While not mentioning race specifically, in closing argument the prosecution told the jury to rely on the twenty-four factors provided by its witness. The jury was told to take the formula of twenty-four factors and "plug it in."[33] The jury found that Saldano was a future danger to society and that there were not sufficient mitigating factors to warrant life imprisonment.[34] Accordingly, the trial court sentenced Saldano to the death penalty.[35]

In Saldano's direct appeal to the Texas Court of Criminal Appeals, he asserted numerous claimed errors, including the use of race as a factor in determining future dangerousness. In upholding the sentence, the court recognized that the prosecution's witness testified that

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30. 20 SF at 132-34, 153.

31. 20 SF at 187-88.

32. 20 SF at 188.

33. 21 SF at 303.

34. 21 SF at 307-08.

35. 21 SF at 309.

because Saldano was Hispanic, this was a factor weighing in favor of future dangerousness.[36] In a 6-2 vote, the court held that any claimed error was waived because there had been no objection to the testimony and it did not rise to the level of fundamental error.[37] Writing in concurrence, one judge indicated that, while the danger of presenting the jury with such racially charged testimony was real and should not be sanctioned, he believed the evidence did not harm Saldano.[38]

ARGUMENT

The sole issue raised by Saldano is whether the Texas Court of Criminal Appeals erred in upholding his death sentence, despite the improper introduction of testimony inviting the use of race as a factor in determining future dangerousness, due to his counsel's failure to object. Because the use of race in Saldano's sentencing seriously undermined the fairness, integrity, or public reputation of the judicial process, Texas confesses error and agrees that Saldano is entitled to a new sentencing hearing. *See Zant v. Stephens*, 462 U.S. 862, 886 (1983).

The Court has previously upheld the consideration of "future dangerousness" in the penalty phase of a capital trial. *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994). In fact, the Court has recognized that "a

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36. Pet. App. at 9.

37. Pet. App. at 10.

38. Pet. App. at 11.

defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system." *Id.* However, the Court has held, in dicta, that race cannot be an aggravating factor in determining the death penalty. *Zant,* 462 U.S., at 886. Other courts have made similar observations. *California v. Bacigulupo,* 862 P.2d 808, 820 (Cal. 1993); *Horton v. Georgia,* 295 S.E.2d 281, 285 (Ga. 1982).

"Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell,* 442 U.S. 545, 555 (1979). A defendant is "entitled to have his punishment assessed by a jury based upon consideration of the mitigating and aggravating circumstances concerning his personal actions and intentions, not those of a group of people with whom he share[s] a characteristic." *Guerra v. Collins,* 916 F.Supp. 620, 630 (S.D. Tex. 1995), *aff'd,* 90 F.3d 1075 (CA5 1996).

The Court has recognized the harm associated with the introduction of race into the criminal justice system. In *McCleskey v. Kemp,* the Court explained:

> Because of the risk that the factor of race may enter the criminal justice process, we have engaged in "unceasing efforts" to eradicate racial prejudice from our criminal justice system. Our efforts have been guided by our recognition that "the inestimable privilege of trial by jury ... is a vital principle, underlying the whole administration of criminal justice."

> Thus, it is the jury that is a criminal defendant's fundamental "protection of life and liberty against race or color prejudice."

481 U.S. 279, 309-10 (1987) (citations omitted). Despite the fact that sufficient proper evidence was submitted to the jury to justify the finding of Saldano's future dangerousness, the infusion of race as a factor for the jury to weigh in making its determination violated his constitutional right to be sentenced without regard to the color of his skin.

It is appropriate for the Court to grant certiorari, vacate the judgment below, and remand the case (GVR) when such resolution is supported by the equities of the case. *Lawrence v. Charter*, 516 U.S. 163, 167-68 (1996). The Court has broad power to GVR. *Id.* at 166. When the government confesses error in the judgment below, the Court may vacate the judgment and remand the case to the trial court for further proceedings. *See,* e.g., *Fogel v. United States*, 335 U.S. 865 (1948); *Shelton v. United States*, 346 U.S. 270, 270 (1953). Further, in cases such as this, when it appears that a confession of error reveals a genuine and potentially determinative error by the court below, a GVR is appropriate. *Lawrence,* 516 U.S., at 172.

CONCLUSION

For the reasons stated, Texas respectfully requests that the Court grant the petition, vacate the trial court's imposition of sentence on Saldano, and remand the case to the trial court with instructions that Saldano receive a new sentencing hearing in which race is not considered.

Respectfully submitted,

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No. 15-8049

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IN THE

Supreme Court of the United States

DUANE EDWARD BUCK,

Petitioner,

v.

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QUESTION PRESENTED

Duane Buck's death penalty case raises a pressing issue of national importance: whether and to what extent the criminal justice system tolerates racial bias and discrimination. Specifically, did the United States Court of Appeals for the Fifth Circuit impose an improper and unduly burdensome Certificate of Appealability (COA) standard that contravenes this Court's precedent and deepens two circuit splits when it denied Mr. Buck a COA on his motion to reopen the judgment and obtain merits review of his claim that his trial counsel was constitutionally ineffective for knowingly presenting an "expert" who testified that Mr. Buck was more likely to be dangerous in the future because he is Black, where future dangerousness was both a prerequisite for a death sentence and the central issue at sentencing?

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OPINIONS BELOW

The November 6, 2015 opinion of the Court of Appeals denying rehearing *en banc* (Joint Appendix ("JA") 288a) is available at 2015 WL 6874749 (5th Cir. Nov. 6, 2015). The August 20, 2015 panel opinion of the Court of Appeals denying Mr. Buck a COA (JA 274a) is reported at 623 F. App'x 668. The March 11, 2015 Order of the United States District Court for the Southern District of Texas denying Mr. Buck's motion to alter or amend that Court's prior judgment (JA 269a) is unreported. The August 29, 2014 Memorandum and Order of the United States District Court for the Southern District of Texas denying Mr. Buck's motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) (JA 249a) is unreported. The July 24, 2006 Memorandum and Order of the United States District Court for the Southern District of Texas denying Mr. Buck's Petition for Writ of Habeas Corpus (JA 219a) is unreported.

JURISDICTION

The Court of Appeals entered its judgment on November 6, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves a state criminal defendant's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments. The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in relevant part:

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the application of 28 U.S.C. § 2253(c), which states:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from
>
> . .
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;
>
> . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

I. Introduction

This is an extraordinary case. Duane Buck is a Black man whose own attorneys presented an "expert" opinion that he is more likely to commit future acts of violence—and was therefore more deserving of a death sentence under Texas law—because of his race. The State of Texas conceded that this race-as-dangerousness testimony is constitutionally prohibited and undermines public confidence in the criminal justice system. Texas subsequently promised that it would not oppose new sentencing hearings in seven capital cases—including Mr. Buck's—that were corrupted by race-as-dangerousness testimony from the same expert. Texas kept its promise in six of those cases, but reneged on its promise to Mr. Buck alone. When Mr. Buck filed his federal habeas petition raising, *inter alia*, an ineffective assistance of counsel ("IAC") claim that challenged his trial counsel's presentation of the race-as-dangerousness "expert" opinion, Texas successfully argued that the claim was procedurally defaulted because Mr. Buck's state habeas counsel failed to raise the claim in a timely manner.

Intervening precedent from this Court establishes that the procedural default urged by Texas, and accepted by the District Court when it denied Mr. Buck's habeas petition, no longer prevents merits review of Mr. Buck's IAC claim. Yet, when Mr. Buck sought to reopen the judgment based on the confluence of circumstances that render his case extraordinary, the lower courts improperly denied relief and concluded that Mr. Buck was not even able to satisfy the threshold showing necessary for a

Certificate of Appealability ("COA"). As a result, a death sentence tainted by egregious racial bias remains intact, and the legitimacy of our criminal justice system has been seriously undermined.

II. The Capital Trial Proceedings

In 1996, Mr. Buck was charged with capital murder in connection with the shooting deaths of Debra Gardner and Kenneth Butler. The evidence at trial showed that in the early morning hours of July 30, 1995, Mr. Butler, his brother Harold Ebnezer, Mr. Buck's step-sister Phyllis Taylor, and Debra Gardner were gathered at Ms. Gardner's home. Mr. Buck had been in a romantic relationship with Ms. Gardner that ended two or three weeks earlier. Mr. Buck forced his way into the home, argued with and struck Ms. Gardner, stated that he was there to pick up his clothes, retrieved a few items, and then left. JA 250a–251a. Believing Ms. Gardner was sleeping with Mr. Butler, JA 251a, Mr. Buck returned to the home a few hours later with a rifle and a shotgun. He attempted to shoot Mr. Ebnezer but missed. Mr. Buck then shot Ms. Taylor and Mr. Butler. Ms. Gardner fled into the street. Mr. Buck followed, and shot her while her children were watching. Ms. Taylor survived but Mr. Butler and Ms. Gardner died from their wounds. JA 251a–252a. A police officer testified that after Mr. Buck was arrested at the scene, he laughed and stated, "The bitch deserved what she got." JA 252a, 262a.

At trial, Mr. Buck was represented by court-appointed counsel, Danny Easterling and Jerry Guerinot. Mr. Guerinot's history of providing inadequate representation to capitally charged clients is well

documented: "Twenty of Mr. Guerinot's clients [were] sentenced to death." Adam Liptak, *A Lawyer Known Best for Losing Capital Cases*, N.Y. Times, May 17, 2010, *available at* www.nytimes.com/2010/05/18/us/18bar.html.

Prior to trial, Mr. Buck's counsel received a report from Dr. Walter Quijano, one of two psychologists retained by the defense, to assess, *inter alia*, whether Mr. Buck was likely to commit criminal acts of violence in the future. "Future dangerousness" is one of the "special issues" that a Texas jury must find to exist—unanimously and beyond a reasonable doubt—before a defendant may be sentenced to death. *See* Tex. Code Crim. Proc. art. 37.071 § 2 (West 2013). In his report, Dr. Quijano opined that being "Black" was a "statistical factor" that "Increased [the] probability" Mr. Buck would commit future acts of criminal violence. JA 18a–19a, 35a–36a; *see Buck v. Thaler*, 132 S. Ct. 32, 33 (2011) (Statement of Alito, J.). This purported link between race and future dangerousness had been discredited well before Mr. Buck's trial.[1]

Future dangerousness was the central disputed issue at the sentencing phase of Mr. Buck's trial. In an effort to make its case, the prosecution emphasized the facts of the capital crime and called Mr. Buck's ex-girlfriend, Vivian Jackson, to testify that Mr. Buck

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[1] *See* J. W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from the Epidemiologic Catchment Area Surveys*, 41 Hosp. & Comm. Psych., 761–70 (1990) (when controlling for socioeconomic status, correlations between race and violence disappear); *see also* J. Monahan et. al., RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE, Oxford Univ. Press (2001) (same).

abused her, especially at the end of their relationship. JA 125a–127a. The prosecution presented no evidence that Mr. Buck had been violent outside the context of romantic relationships. Indeed, although the prosecution submitted records demonstrating that Mr. Buck had previously been convicted of delivery of cocaine and unlawfully carrying a weapon, JA 185a; Tr. 5–28, *Buck v. Stephens*, No. 4:04-cv-03965 (S.D. Tex. June 24, 2005), ECF No. 5-111, pp. 17–40, none of Mr. Buck's prior convictions were for crimes of violence.

The defense presented testimony from Mr. Buck's father James Buck, his stepmother Sharon Buck, his sister Monique Winn, and Reverend J. C. Neal. Tr. 76–79, Buck, No. 4:04-cv-03965 (S.D. Tex. June 24, 2005), ECF No. 5-113, pp. 9–12. These witnesses, who had known Mr. Buck most, if not all, of his life, testified that they had never known Mr. Buck to be violent. In addition, the defense presented the testimony of psychologist Patrick Lawrence. Dr. Lawrence had previously appeared on behalf of both the prosecution and defense in Texas courts, and, over the prior 25 years, evaluated roughly 900 prisoners convicted of homicide. *See* Tr. 177, 182–186, 188–204, 205–06, *id.* at ECF Nos. 5-115, pp. 34, 39–41; 5-116, pp. 5–21.

Dr. Lawrence testified that Mr. Buck was not likely to be dangerous in the future. JA 193a, 223a. He based his opinion on, *inter alia*, the undisputed facts that: Mr. Buck was unlikely to develop a romantic relationship with a woman in prison, and Mr. Buck's records showed he "did not present any problems in the prison setting" and, indeed, had been held in minimum security custody. *See* Tr. 196, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June

24, 2005), ECF No. 5-116, p. 13. Dr. Lawrence also testified that intellectual testing revealed Mr. Buck has an IQ of 75, "which suggests that he functions within the borderline intellectual range of the population at about the 4 percentile." Tr. 189, *id.* at p. 6.

Despite the absence of evidence suggesting that Mr. Buck was likely to be dangerous outside of the context of a domestic relationship with a woman, defense counsel also presented Dr. Quijano's "expert" opinion that Mr. Buck was more likely to commit future crimes of violence because he is Black. Even though Dr. Quijano's report identified Mr. Buck's "race" as a "statistical factor" that increased his probability of being a future danger, defense counsel specifically asked Dr. Quijano to recount the "statistical factors or environmental factors" relevant to assessing the future dangerousness of a person "such as Mr. Buck." JA 145a–146a. Dr. Quijano's response tracked his report. He testified that "race" was among the "statistical factors he considered in deciding whether a person will or will not constitute a continued danger" because "[i]t's a sad commentary that minorities, Hispanics and black people, are over represented in the Criminal Justice System." JA 146a.

On cross-examination, the trial prosecutor exploited defense counsel's introduction of Dr. Quijano's race-as-dangerousness testimony:

> Q: You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?

A: Yes.

JA 170a.

At defense counsel's request, and over the prosecution's objection, Dr. Quijano's report detailing his opinion ("**Race. Black. Increased probability**" of future dangerousness) was admitted into evidence and made available to the jury during deliberations. JA 151a–152a.

Future dangerousness was the focus of both the prosecution's and the defense's closing arguments. JA 187a–196a (defense closing); JA 196a–206a (prosecution closing). Indeed, the lead prosecutor urged the jury to rely on Mr. Buck's own expert to find that he was likely to be dangerous in the future: "You heard from Dr. Quijano, who had a lot of experience in the Texas Department of Corrections, who told you that there was a probability that [Mr. Buck] would commit future acts of violence." JA 198a.

The jury deliberated over the course of two days, during which time they sent out four notes seeking further instruction, as well as the opportunity to review, *inter alia*, Dr. Quijano's report. JA 209a. The jury ultimately found that Mr. Buck was likely to be a future danger, and he was sentenced to death. Mr. Buck's conviction and death sentence were affirmed on direct appeal. *Buck v. State*, No. 72,810 (Tex. Crim. App. 1999) (unpublished).

III. Post-Conviction Proceedings

A. Mr. Buck's Initial State Habeas Petition

In March of 1999, Mr. Buck's newly appointed counsel, Robin Norris, filed his initial state habeas application. Like Mr. Buck's trial counsel, Mr. Norris has a troubling pattern of deficient representation of death-sentenced prisoners. In another capital case, the Texas Court of Criminal Appeals ("CCA") found that Mr. Norris threw his client "under the bus" by filing an initial state habeas application that was "only four pages long and merely state[d] factual and legal conclusions." *Ex parte Medina*, 361 S.W.3d 633, 635–36 (Tex. Crim. App. 2011). His representation of Mr. Buck was characterized by similar deficiencies.

As explained by three Judges of the CCA, Mr. Norris "filed only non-cognizable or frivolous claims in [Mr. Buck's] initial application." *Ex parte Buck*, 418 S.W.3d 98, 107 (Tex. Crim. App. 2013) (Alcala, J., joined by Price and Johnson, JJ.), *cert. denied*, 134 S. Ct. 2663 (2014). "[T]hree of the four claims . . . were raised and rejected on direct appeal and, therefore, under the longstanding precedent of [the CCA], those claims were not cognizable on a post-conviction writ of habeas corpus." *Id.* at 102. The fourth claim was "wholly frivolous" because it asserted that "[Mr. Buck's] trial counsel [were] ineffective for failing to request a jury instruction based on a non-existent provision of the penal code." *Id.* Mr. Norris failed to challenge trial counsel's introduction of Dr. Quijano's "expert" opinion that Mr. Buck's race increased his likelihood of committing future acts of criminal violence.

B. Texas Concedes Error.

One year after the filing of Mr. Buck's state habeas application, another capital case involving Dr. Quijano's race-as-dangerousness opinion reached this Court. In *Saldaño v. Texas*, No. 99–8119, Dr. Quijano served as a prosecution witness and offered his "expert" opinion that a defendant's race or ethnicity is one of the "identifying markers" that increases the likelihood of future dangerousness. *Saldaño v. State*, 70 S.W.3d 873, 884-85 (Tex. Crim. App. 2002). After the CCA affirmed Mr. Saldaño's conviction and sentence, he filed a certiorari petition asking this Court to decide "[w]hether a defendant's race or ethnic background may ever be used as an aggravating circumstance in the punishment phase of a capital murder trial in which the State seeks the death penalty." *Saldaño*, 70 S.W.3d at 875.

Speaking through then-Attorney General John Cornyn, Texas conceded error. In its response to the petition, Texas acknowledged that the "infusion of race as a factor for the jury to weigh in making its determination violated [Mr. Saldaño's] constitutional right to be sentenced without regard to the color of his skin." JA 306a. Texas further recognized that "'[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice,'" and that "the use of race in Saldano's sentencing seriously undermined the fairness, integrity, or public reputation of the judicial process." JA 304a–305a. On June 5, 2000, this Court granted certiorari, vacated the CCA's judgment, and remanded for further consideration in light of Texas's concession. *Saldaño v. Texas*, 530 U.S. 1212 (2000).

Four days later, then-Attorney General Cornyn issued a press release stating that his office had conducted "a thorough audit of cases" and identified six other capital cases involving Dr. Quijano's testimony that "are similar to that of Victor Hugo Saldano." JA 213a. The prisoners in those cases were: Gustavo Garcia, Eugene Broxton, John Alba, Michael Gonzales, Carl Blue, and Duane Buck. JA 215a–217a. The Attorney General did not distinguish between the cases in which Dr. Quijano was called by the prosecution or the defense. Indeed, in three of the cases identified by the Attorney General (Mr. Broxton's, Mr. Gonzales's, and Mr. Garcia's), the prosecution called Dr. Quijano; in the three other cases (Mr. Alba's, Mr. Blue's, and Mr. Buck's), Dr. Quijano was a defense witness. JA 215a. The Attorney General stressed that "it is inappropriate to allow race to be considered as a factor in our criminal justice system," and that the "people of Texas want and deserve a system that affords the same fairness to everyone." JA 213a–214a.

In a separate statement to the media, the Attorney General's spokesperson announced that Texas would not oppose federal habeas claims for relief based on Dr. Quijano's unconstitutional, race-based testimony in any of the similar-to-*Saldaño* cases;[2] acknowledged that

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[2] James Kimberly, Death Penalties of 6 in Jeopardy: Attorney General Gives Result of Probe into Race Testimony, HOU. CHRON., June 10, 2000, at A1, *available at* https://advance.lexis.com/api/permalink/0147fb80-a512-4a2b-88ff-9a6f07f184d9/?context=1000516; Jim Yardley, Racial Bias Found in Six More Capital Cases, N.Y. TIMES, June 10, 2000, *available at* http://www.nytimes.com/2000/06/11/us/racial-bias-found-in-six-more-capital-cases.html. Thus, contrary to the Fifth Circuit's suggestion, *see* JA 277a, the record makes clear that Texas promised to treat Mr.

some of the six cases might still be in state court (where the Attorney General is not responsible for litigating on the State's behalf); and promised that, if and when those cases reached the Attorney General's Office, they "will be handled in a similar manner as the Saldaño case." JA 281. At the time, only one of the six similar-to-*Saldaño* cases was still pending in state court: Mr. Buck's case.[3]

Prior to the Attorney General's admission of error, none of the six identified defendants had challenged the constitutionality of Dr. Quijano's testimony. Nonetheless, Texas kept its promise, waived all procedural defenses, conceded constitutional error, and agreed that a new sentencing hearing was required in each case except Mr. Buck's.[4]

Buck's case similarly to *Saldaño*, i.e., a case in which it conceded error based on Dr. Quijano's testimony in federal habeas. Mr. Buck's Rule 60(b) motion pled these facts, thus any material factual disputes about the details of Texas's promise are properly addressed at an evidentiary hearing.

[3] *See* Opinion and Order at 3, *Blue v. Johnson*, No. 4:99-cv-00350 (S.D. Tex. Sept. 29, 2000), ECF No. 29; Order at 1, *Alba v. Johnson*, No. 4:98-cv-221 (E.D. Tex. Sept. 25, 2000), ECF No. 31; Order at 1, *Garcia v. Johnson*, No. 1:99-cv-00134 (E.D. Tex. Sept. 7, 2000), ECF No. 36; Order at 3, *Broxton v. Johnson*, No. H-00-CV-1034, ECF No. 25; Order at 11, *Gonzales v. Cockrell*, No. 7:99-cv-00072 (W.D. Tex. Dec. 19, 2002), ECF No. 84.

[4] *See* Opinion and Order at 15–17, *Blue v. Johnson*, No. 4:99-cv-00350 (S.D. Tex. Sept. 29, 2000), ECF No. 29; *Alba v. Johnson*, No. 00-40194, 2000 WL 1272983, at *1 (5th Cir. Aug. 21, 2000); Order at 1, *Alba v. Johnson*, No. 4:98-cv-221 (E.D. Tex. Sept. 25, 2000), ECF No. 31; Order at 1, *Garcia v. Johnson*, No. 1:99-cv-00134 (E.D. Tex. Sept. 7, 2000), ECF No. 36; Resp. to Suppl. Pet. and Confession of Error by TDCJ-ID, *Garcia*, No. 1:99-cv-00134

C. Subsequent State Habeas Proceedings

In 2002—two years after the Texas Attorney General's public statements regarding the similar-to-*Saldaño* cases—Mr. Norris filed a subsequent application for state habeas relief where he challenged, for the first time, trial counsel's introduction of Dr. Quijano's opinion that Mr. Buck was more likely to be a future danger because he is Black. Subsequent Appl. for Writ of Habeas Corpus, *Ex parte Buck*, No. WR-57,004-02 (Tex. Crim. App. Oct. 15, 2003), ECF No. 5-152, pp. 6, 9. In a consolidated order, the CCA dismissed the subsequent application as an abuse of the writ without considering the merits of Mr. Buck's ineffectiveness claim, and denied the non-cognizable and frivolous claims that Mr. Norris presented in the initial (1999) application on their merits. Order, *Ex parte Buck*, No. WR-57,004-02 (Tex. Crim. App. Oct. 15, 2003) (unpublished).

D. Federal Habeas Proceedings

Represented by new counsel, Mr. Buck filed a federal habeas corpus petition in October 2004, asserting, *inter alia*, that Mr. Buck's federal constitutional rights to equal protection, due process, and the effective assistance of counsel were violated by the introduction of "expert" testimony and an "expert" report linking Mr. Buck's race to an increased likelihood of future dangerousness. Pet. for Writ of Habeas Corpus at 55–62, *Buck v. Cockrell*, No.

(E.D. Tex. Aug. 18, 2000), ECF No. 35; *Broxton v. Johnson*, No. H-00-CV-1034, 2001 U.S. Dist. LEXIS 25715, at *15 (S.D. Tex. Mar. 28, 2001); Final J. at 1, *Gonzales v. Cockrell*, No. 7:99-cv-00072 (W.D. Tex. Dec. 19, 2002), ECF No. 84.

04-03965 (S.D. Tex. Oct. 14, 2004), ECF No. 1. However, despite Texas's promise to concede constitutional error in Mr. Buck's case—a promise that Texas kept in all five of the other similar-to-*Saldaño* cases—Texas reversed course and argued that federal review of Mr. Buck's ineffectiveness claim was foreclosed by state habeas counsel's default of that claim. In its answer to Mr. Buck's habeas petition, Texas stated:

> This Court is no doubt aware that the Director waived similar procedural bars and confessed error in other cases involving testimony by Dr. Quijano, most notably the case of Victor Hugo Saldano (collectively referred to as "the *Saldano* cases"). This case, however, presents a strikingly different scenario than that presented in Saldano—Buck himself, not the State offered Dr. Quijano's testimony into evidence. Based on this critical distinction, the Director deems himself compelled to assert the valid procedural bar precluding merits review of Buck's constitutional claims. And on this basis, federal habeas relief should be denied.

Respondent Dretke's Answer and Motion for Summ. J. with Brief in Support at 17, *Buck*, No. 4:04-cv-03965 (S.D. Tex. Sept. 6, 2005), ECF No. 7, p. 17 (citation omitted). Texas further maintained that "the former actions of the Director [in the other five cases] are not applicable and should not be considered in deciding this case." *Id.* at 20.

This account was highly misleading. Texas failed to disclose that, as described: (1) after a "thorough audit," then-Texas Attorney General Cornyn identified Mr. Buck's

case as "similar to that of Victor Hugo Saldano," just like the other five cases in which Texas waived procedural bars and conceded error; and (2) in two of the other similar-to-*Saldaño* cases, Dr. Quijano was called as a defense witness. JA 213a.

Because Texas reversed course in Mr. Buck's case and raised a procedural defense, the District Court denied relief. Relying on *Coleman v. Thompson*, 501 U.S. 722 (1991), the court held that Mr. Buck's Quijano-related claims were procedurally defaulted because the state court had dismissed them on an independent and adequate state ground: state habeas counsel's failure to timely raise the claims. JA 237a–239a.

Between 2006 and 2012, Mr. Buck repeatedly sought review of the District Court's denial of his habeas petition. *See Buck v. Thaler*, 345 F. App'x 923 (5th Cir. 2009) (affirming denial of habeas relief and denying request for COA); *Buck v. Thaler*, 559 U.S. 1072 (2010) (denying certiorari); *Buck v. Thaler*, 452 F. App'x 423 (5th Cir. 2011) (denying stay of execution and motion for relief from judgment); *Buck v. Thaler*, 132 S. Ct. 69 (2011) (denying petition for writ of certiorari and motion for stay of execution); *Buck*, 132 S. Ct. 32 (2011) (denying certiorari); *Buck v. Thaler*, 132 S. Ct. 1085 (2012) (denying rehearing).

Mr. Buck did not seek further review of his IAC claim because *Coleman* foreclosed it. Mr. Buck instead challenged the prosecutor's reiteration of Dr. Quijano's race-as-dangerousness opinion on cross-examination and her reliance on Dr. Quijano's testimony in closing argument to urge the jury to find Mr. Buck a future danger. In response, Texas consistently asserted that Mr. Buck's trial

counsel—rather than the prosecution—was responsible for placing Dr. Quijano's false and inflammatory opinion about race before the jury.[5] The Court of Appeals agreed with Texas. *Buck*, 345 F. App'x at 930.

In 2011, three Justices of this Court reached the same conclusion. In a statement regarding the denial of Mr. Buck's petition for certiorari challenging the trial prosecutor's conduct, Justice Alito—joined by Justices Scalia and Breyer—explained that responsibility for the introduction of "bizarre and objectionable" expert testimony linking Mr. Buck's race to an increased likelihood of future dangerousness "lay squarely with the defense." *Buck*, 132 S. Ct. at 33, 35.

E. Mr. Buck's 2013 State Habeas Application and the *Trevino* Decision

Mr. Buck filed a new state habeas application in March 2013. Application for Post-Conviction Writ of Habeas Corpus, *Ex parte Buck*, No. WR-57,004-03 (Tex. Crim. App. Mar. 28, 2013). In that petition, Mr. Buck challenged, *inter alia*, his trial counsel's ineffective failure to investigate, develop, and present available, mitigating evidence, including Phyllis Taylor's statement that on the night of the shooting, Mr. Buck was "different from the

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[5] Respondent's Answer at 17–18, 20, *Buck v. Dretke*, No. 04-03965 (S.D. Tex. Sept. 6, 2005), ECF No. 6; Thaler's Reply to Buck's Mot. for Relief from J. and Mot. for Stay of Execution at 10, 16–17, 19–20, *Buck v. Thaler*, 04-03965 (S.D. Tex. Sept. 9, 2011), ECF No. 30; Resp. in Opp'n to Appl. for Cert. of Appealability at 22–25, 28–30, *Buck v. Thaler*, No. 11-70025 (5th Cir. Sept. 14, 2011), ECF No. 511602284; Br. in Opp'n at 12–13, 18–20, *Buck v. Thaler*, Nos. 11-6391 & 11A297 (U.S. Sept. 15, 2011).

person [she] grew up with" due to his drug and alcohol intoxication. *Id.* at 89. A sharply divided CCA dismissed the application for "fail[ing] to satisfy the requirements of Article 11.071, § 5(a)." *Ex parte Buck*, 418 S.W.3d 98. In her dissenting opinion, Judge Alcala—joined by Judges Price and Johnson—explained that "[Mr. Buck's case] reveals a chronicle of inadequate representation at every stage of the proceedings, the integrity of which is further called into question by the admission of racist and inflammatory testimony from an expert witness at the punishment phase." *Id.* at 107.

While Mr. Buck's application was pending before the CCA, this Court created a new exception to the procedural bar on which Texas successfully relied to prevent federal habeas review of Mr. Buck's IAC claim. Specifically, in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), this Court held that *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), applied to Texas. *Martinez* "'modif[ied] the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default.'" *Trevino*, 133 S. Ct. at 1917 (quoting *Martinez*, 132 S. Ct. at 1315). *Martinez* and *Trevino* allow, for the first time, an opportunity for federal review of defaulted IAC claims where (1) the IAC claim is "substantial"; (2) there was no counsel or there was ineffective counsel during the initial state post-conviction review of the claim; and (3) state law effectively requires ineffective assistance of trial counsel claims to be litigated on initial collateral review. *Trevino*, 133 S. Ct. at 1918 (quoting *Martinez*, 132 S. Ct. at 1318–20). A "substantial" claim is one that "has some merit." *Martinez*, 132 S. Ct. at 1318 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for COA to issue)).

F. Mr. Buck's Post-*Trevino* Federal Habeas Proceedings

On January 7, 2014, immediately after the denial of the pending state habeas application, Mr. Buck filed a motion for relief from the District Court's denial of the IAC claim in his initial federal habeas petition. Rule 60(b)(6) Motion, *Buck*, No. 04-03965 (S.D. Tex. Jan. 7, 2014), ECF No. 49. In this motion, Mr. Buck detailed the following "extraordinary circumstances" justifying the reopening of a final judgment under Rule 60(b)(6) of the Federal Rules of Civil Procedure ("Rule 60(b)(6)" or "Rule 60(b)") and *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005):

> 1. Mr. Buck's trial attorney knowingly presented expert testimony to the sentencing jury that Mr. Buck's race made him more likely to be a future danger;
>
> 2. Although required to act as a gate-keeper to prevent unreliable expert opinions from reaching and influencing a jury, *see* Tex. R. Evid. 705(c); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992), the trial court qualified Dr. Quijano as an expert on predictions of future dangerousness, allowed him to present race-based opinion testimony to Mr. Buck's capital sentencing jury, and admitted Dr. Quijano's excludable hearsay report linking race to dangerousness;
>
> 3. The trial prosecutor intentionally elicited Dr. Quijano's testimony that Mr. Buck's race made him more likely to be a future danger

on cross-examination, vouched for him as an "expert" in closing, and asked the jury to rely on Dr. Quijano's testimony to answer the future dangerousness special issue in the State's favor;

4. Mr. Buck's state habeas counsel did not challenge trial counsel's introduction of this false and offensive testimony—or Texas's reliance on it—in Mr. Buck's initial state habeas application;

5. The Texas Attorney General conceded constitutional error in Mr. Buck's case and promised to ensure that he received a new sentencing, but reneged on that promise after deciding that the introduction of the offensive testimony was trial counsel's fault;

6. Th[e District] Court ruled that federal review of Mr. Buck's trial counsel ineffectiveness claim was foreclosed by state habeas counsel's failure to raise and litigate the issue in Mr. Buck's initial state habeas petition, relying on *Coleman*, which has subsequently been modified by *Martinez* and *Trevino*;

7. The Fifth Circuit held Mr. Buck's trial counsel responsible for the introduction of Dr. Quijano's testimony linking Mr. Buck's race to his likelihood of future dangerousness;

8. Three Supreme Court Justices concluded that trial counsel was at fault for the introduction of Dr. Quijano's testimony;

> 9. Three judges of the CCA found that "because [Mr. Buck's] initial habeas counsel failed to include any claims related to Dr. Quijano's testimony in his original [state habeas] application, no court, state or federal, has ever considered the merits of those claims," *Buck*, 2013 WL 6081001, at *5;
>
> 10. Mr. Buck's case is the only one in which Texas has broken its promise to waive procedural defenses and concede error, leaving Mr. Buck as the only individual in Texas facing execution without having been afforded a fair and unbiased sentencing hearing; and,
>
> 11. Martinez and Trevino now allow for federal court review of "substantial" defaulted claims of trial counsel ineffectiveness.

JA 283a–285a.

In adjudicating Mr. Buck's Rule 60(b) motion, the District Court recognized that trial counsel "recklessly exposed [Mr. Buck] to the risks of racial prejudice and introduced testimony that was contrary to [Mr. Buck's] interests." JA 264a. Remarkably, however, the court concluded that trial counsel's introduction of an expert opinion that Mr. Buck's race made him more likely to commit future acts of criminal violence—and thus more deserving of a death sentence under Texas law—had only a "*de minimis*" effect on Mr. Buck's sentencing. JA 259a. The court held that Mr. Buck was not entitled to reopen the judgment because: (1) his case did not involve the extraordinary circumstances required by Rule 60(b)(6); and (2) in the alternative, Mr. Buck was not prejudiced by

his trial counsel's constitutionally deficient performance. JA 259a–260a, 271a–272a. The District Court further determined that its rulings on these points were not debatable among jurists of reason, and thus Mr. Buck was not entitled to a COA. JA 264a–265a.

Without addressing the merits of Mr. Buck's IAC claim, the Fifth Circuit likewise denied a COA, declaring that "[Mr.] Buck has not made out even a minimal showing that his case is exceptional," within the meaning of Rule 60(b). JA 283a. The Fifth Circuit insisted that Mr. Buck's IAC claim "is at least unremarkable as far as IAC claims" and that Texas's "broken-promise . . . makes [the case] odd and factually unusual," but not even debatably extraordinary. JA 285a–286a.

Dissenting from the denial of *en banc* review, Judge Dennis, joined by Judge Graves, concluded that Mr. Buck was clearly entitled to a COA, and that the panel's contrary decision was consistent with the Fifth Circuit's "'troubling' habit" of applying an improper COA analysis. JA 290a (quoting *Jordan v. Fisher*, 135 S. Ct. 2647, 2652 n.2 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from the denial of certiorari). Judge Dennis explained that the panel "'dismisse[d], miscast[], and minimize[d] [Mr. Buck's] evidence, diluting its full weight by disaggregating it and focusing the inquiry on determining whether each isolated piece of evidence, taken alone,' proves extraordinary circumstances." JA 292a. By contrast, a "proper, threshold inquiry into [Mr.] Buck's claim would have revealed that reasonable jurists could disagree with the district court's conclusions," because the factors presented by Mr. Buck "describe a situation that is at least debatably 'extraordinary.'" JA 293a–294a.

SUMMARY OF THE ARGUMENT

Mr. Buck's trial counsel rendered ineffective assistance by knowingly presenting an expert opinion that Mr. Buck was more likely to commit future acts of violence because he is Black. That testimony was so directly contrary to Mr. Buck's interests, no competent defense attorney would have introduced it.

Counsel's constitutionally deficient performance powerfully undermines confidence in Mr. Buck's sentence of death. For over a century, courts have recognized that racially inflammatory statements presented during a criminal trial create a constitutionally intolerable risk that the jury will make its decision based on a quintessentially arbitrary factor (race), instead of the relevant evidence. These precedents apply *a fortiori* to Mr. Buck's case because Dr. Quijano's race-as-dangerousness opinion: (1) validated a uniquely pernicious stereotype; (2) was presented by a purported "expert" for the defense; and (3) was introduced at a capital sentencing hearing where the principal issue for the jury to decide was whether Mr. Buck was likely to be dangerous in the future. The prejudice to Mr. Buck from the introduction of this "expert" opinion—that Black men are predisposed to criminal violence—is especially clear because the prosecution's case in support of future dangerousness was not overwhelming, and the jury struggled to reach a decision.

Further, Texas's ordinary interest in finality is not compelling here because it promised not to rely on procedural defenses in a number of cases, including Mr. Buck's, in order to preserve the integrity of the rule of law, and then kept its promise in all of those cases except

Mr. Buck's. The *sui generis* facts of this case (at, and after, trial)—combined with Mr. Buck's diligence and the change in law worked by *Trevino* and *Martinez*—establish the "extraordinary circumstances" required by Rule 60(b). The failure to reopen the District Court's judgment denying Mr. Buck's Sixth Amendment claim creates both a profound risk of injustice to Mr. Buck—who faces execution pursuant to a death sentence marred by racial bias—and a profound risk of harm to society's confidence in the integrity of the criminal justice system.

Under any standard of review, the lower courts' denial of Mr. Buck's Rule 60(b) motion was erroneous. The denial of a COA was even more improper. A COA is required so long as reasonable jurists could find the denial of relief debatable or the issues presented by the petitioner adequate to proceed further. Mr. Buck surely meets this threshold standard, and the Court of Appeals' failure to grant a COA reflects its failures to properly apply this Court's precedent and to acknowledge the plainly extraordinary circumstances of Mr. Buck's case.

ARGUMENT

As this Court has stressed, a COA is required so long as a habeas petitioner makes a "threshold" showing that the District Court's decision was "debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336. Thus, "[a] court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* at 337. Instead, "a prisoner seeking a COA need only demonstrate 'a substantial showing'" that the district court erred in denying relief. *Id.* at 327 (quoting *Slack v. McDaniel*,

529 U.S. 473, 474, 484 (2000) and 28 U.S.C. § 2253(c)(2)). That standard is satisfied when reasonable jurists could either disagree with the district court's denial of relief, or determine that "the issues presented . . . deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327, 336.

Thus, Mr. Buck is entitled to a COA so long as the District Court's decision denying his Rule 60(b) motion was at least debatable among reasonable jurists. *Id.* at 342; *see also id.* at 348 (Scalia, J., concurring) (a COA must be granted if resolution of the petitioner's claims is not "undebatable"). Mr. Buck unquestionably meets that standard with respect to both the procedural issue of whether extraordinary circumstances exist and the underlying constitutional issue of whether his counsel were ineffective. *See Slack*, 529 U.S. at 484–85 (when a petition is dismissed on procedural grounds, determining whether a COA should issue requires consideration of whether reasonable jurists could debate both the underlying constitutional claims and the district court's procedural ruling). Because the facts supporting the underlying constitutional claim inform the extraordinary circumstances analysis in this case, Mr. Buck begins with his IAC claim.

I. Trial Counsel Rendered Ineffective Assistance by Presenting an "Expert" Opinion that Mr. Buck Is More Likely to be Dangerous in the Future Because He Is Black.

The principal issue at the sentencing phase of Duane Buck's capital trial was whether he was likely to commit future acts of criminal violence if sentenced to life

imprisonment. Under Texas law, an affirmative finding by the jury on this special issue was required for a death sentence. But the prosecution presented no evidence that Mr. Buck had been violent outside the context of romantic relationships with two women, and the jurors learned that he had adjusted well to prison. Consistent with the lack of future dangerousness evidence, the jury struggled to determine the appropriate sentence and did not reach a verdict until the second day of deliberations.

Mr. Buck's own lawyers, however, tipped the balance in the prosecution's favor. They introduced an "expert" opinion that, because Mr. Buck is Black, he was more likely to be dangerous in the future. Put another way: Mr. Buck's lawyers presented evidence that Mr. Buck was more deserving of a death sentence under Texas law because of his race.

Introducing this false and prejudicial evidence was the epitome of ineffective assistance of counsel. As the CCA held in 1925, "[n]o lawyer could believe that" a question injecting racial bias into a criminal trial "could have been permissible in any state court, and the very asking of it was so repulsive to every idea of a fair trial as to cause us to have no hesitancy in holding it reversible error." *Derrick v. State*, 272 S.W. 458, 459 (1925). Yet, over 70 years later, Mr. Buck's lawyers not only injected racial bias into his capital trial, they appealed to the uniquely pernicious stereotype that "blacks are violence prone." *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion). Even worse, defense counsel did so through a clinical psychologist who was stamped with the imprimatur of an "expert," lending special weight to his opinion.

No reasonable defense attorney would have presented Dr. Quijano's race-as-dangerousness opinion. Moreover, there is a reasonable probability that had his opinion not been presented, at least one juror would have reached a different conclusion about Mr. Buck's likelihood of committing future acts of violence. Mr. Buck has therefore satisfied both the deficient performance and prejudice prongs of the *Strickland* test. *See Strickland v. Washington*, 466 U.S. 668 (1984).

A. The District Court Correctly Recognized that Counsel Performed Deficiently by Knowingly Exposing Mr. Buck to the Risks of Racial Prejudice.

As this Court explained in *Strickland*, "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." 466 U.S. at 684. "That a person who happens to be a lawyer is present at trial alongside the accused . . is not enough to satisfy the constitutional command." *Id.* at 685. Rather, because the Sixth Amendment "envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results," a defendant "is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Id.* The Sixth Amendment right to counsel is therefore the right to the effective assistance of counsel, measured by the familiar two-part test of deficient performance and prejudice. *See id.* at 686–87.

Counsel's performance is deficient when it falls "below an objective standard of reasonableness," as measured "under prevailing professional norms." *Id.* at 688.

Although that "standard is necessarily a general one," *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (per curiam), the "[r]epresentation of a criminal defendant entails certain basic duties," *Strickland*, 466 U.S. at 688. These include the "overarching duty to advocate the defendant's cause" and the "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.*

Mr. Buck's trial lawyers failed to satisfy these basic obligations. As the District Court noted, prior to trial, "Buck's counsel had received Dr. Quijano's expert report . . clearly stating that Buck's race made him statistically more likely to be a future danger." JA 263a. In that report, Dr. Quijano discussed seven "Statistical Factors" that he deemed relevant to "Future Dangerousness," i.e., "Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." JA 18a, 35a. One of those factors was: "**Race**. Black: Increased probability. There is an over-representation of Blacks among the violent offenders." *Id.* at 19a, 36a. (emphasis in original).

No competent defense counsel would have presented Dr. Quijano's race-as-dangerousness opinion to the jury. This Court stated more than 50 years before *Strickland* that one of counsel's essential functions is to ensure the defendant is not "convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). Dr. Quijano's race-as-dangerousness opinion was prototypical "incompetent evidence" that had no place in a capital sentencing proceeding. The Constitution requires that "any decision to impose the death sentence

be, and appear to be, based on reason rather than caprice or emotion," *Godfrey v. Georgia*, 496 U.S. 420, 433 (1980) (citation omitted), and such decisions must reflect an "individualized inquiry" into the defendant's moral culpability, *Romano v. Oklahoma*, 512 U.S. 1, 7 (1994) (citation omitted). Race is an arbitrary, emotionally charged factor that has nothing to do with individual moral culpability. Although it cannot be considered as an aggravating factor at capital sentencing, *Zant v. Stephens*, 462 U.S. 862, 885 (1983), Dr. Quijano's opinion urged the jurors to do just that.

Injecting race into a capital sentencing proceeding is not only wholly improper, it poses a special risk of harm to the defendant. In 2005, this Court repeated an observation about race that it made in 1880: "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Miller-El v. Dretke*, 545 U.S. 231, 237 (2005) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880)). The risk of racial prejudice swaying the judgment of jurors is especially pronounced in a capital sentencing proceeding because "[f]ear of blacks, which could easily be stirred up by the violent facts of [the defendant's] crime, might incline a juror to favor the death penalty." *Turner*, 476 U.S. at 35 (plurality opinion).

Mr. Buck's court-appointed counsel had a duty to be aware of these principles. *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point

is a quintessential example of unreasonable performance under *Strickland*."). As any competent counsel would have recognized, it was contrary to Mr. Buck's interests to present an expert opinion that Mr. Buck possesses an immutable characteristic that renders him prone to criminal violence. JA 19a, 36a. Further, anyone with even a passing knowledge of American history would understand that the immutable characteristic invoked by Dr. Quijano—Mr. Buck's race—was especially likely to bias the jury against him.

Yet, trial counsel not only "called Dr. Quijano to the stand," counsel specifically "elicited his testimony on this point." *Buck*, 132 S. Ct. at 33 (Statement of Alito, J.); *see also* JA 263a–264a (noting "Buck's counsel called Dr. Quijano as a witness and relied on his expert report, although counsel was fully aware of Dr. Quijano's inflammatory opinions about race").

Dr. Quijano began his testimony by discussing his credentials. JA 138a–141a. He then described his evaluation of Mr. Buck, testifying that Mr. Buck has both a dependent personality disorder—meaning he becomes obsessive in relationships and has a very difficult time letting go—as well as alcohol and cocaine dependence disorders. JA 141a–145a; *see also* JA 252a–253a.

Counsel then turned Dr. Quijano's attention to the issue of future dangerousness. Counsel first asked Dr. Quijano to confirm that he was "familiar with the capital murder punishment issues that jurors are given in a capital murder case at the punishment phase," and that he understood the first issue "is whether the State has proven beyond a reasonable doubt that there's a

probability that the defendant would engage in future acts of violence which would constitute a continuing threat to society." JA 145a.

Counsel next asked Dr. Quijano to discuss his "professional opinion regarding Mr. Buck in relation to that issue," and specifically the "statistical factors or environmental factors" that Dr. Quijano found relevant to Mr. Buck's probability of future dangerousness. JA 145a–146a. Counsel did so despite knowing that one of the "statistical factors" Dr. Quijano considered was Mr. Buck's race.

Dr. Quijano's response mirrored his report. *See Buck*, 132 S. Ct. at 33 (Statement of Alito, J.). He described seven "statistical factors we know to predict future dangerousness," one of which was "Race." JA 146a. Dr. Quijano elaborated on the purported support for his opinion that race predicts future dangerousness: "It's a sad commentary that minorities, Hispanics and black people, are over represented in the Criminal Justice System." JA 146a. After identifying race and the other six statistical factors from his report, Dr. Quijano reiterated: "Those are the statistical factors in deciding whether a person will or will not constitute a continuing danger." JA 147a.

Having elicited Dr. Quijano's race-as-dangerousness opinion, defense counsel opened the door for the prosecution to have Dr. Quijano repeat it on cross-examination. *See Buck*, 345 F. App'x at 930. The prosecutor did precisely that, stressing the supposed causal link between race and dangerousness: "You have determined that the . . race factor, black, increases the future dangerousness for various complicated reasons; is that correct?" JA 170a. Dr. Quijano responded unequivocally: "Yes." *Id.*

Trial counsel then presented Dr. Quijano's race-as-dangerousness opinion to the jury for a third time, offering Dr. Quijano's report into evidence. *See Buck*, 132 S. Ct. at 33 (Statement of Alito, J.). In his report, Dr. Quijano stated in no uncertain terms that Mr. Buck's race increased the probability of future violence: "**Race.** Black: Increased probability. There is an over-representation of Blacks among the violent offenders." JA 19a, 36a. Although other portions of Dr. Quijano's report were redacted before it was submitted to the jury, his race-as-dangerousness opinion was not. *Id.*

In sum, "the responsibility for eliciting [Dr. Quijano's] offensive testimony lay[s] squarely with the defense." *Buck*, 132 S. Ct. at 35 (Statement of Alito, J.).

Texas, however, has sought to defend trial counsel's performance by asserting that Dr. Quijano did not say Mr. Buck's "race would make him more likely to be a future danger." Opposition to Petition for a Writ of Certiorari ("Cert. Opp'n") at 21, *Buck v. Stephens*, 136 S. Ct. 2409 (Mar. 21, 2016) (No. 15-8049) (mem.). Instead, according to Texas, Dr. Quijano's "brief remarks . . . about 'minorities, Hispanics and blacks' being overrepresented in the criminal justice system are inherently mitigating." *Id.* at 21–22 (citation omitted). Those assertions are flatly untrue, and reflect an effort to sanitize the profoundly troubling record in this capital case.

There was nothing mitigating about Dr. Quijano's testimony about the overrepresentation of Blacks and Hispanics in the criminal justice system. Instead, Dr. Quijano relied on that overrepresentation as the justification for his repeated assertions—which Texas now

refuses to acknowledge—that Mr. Buck's race made him more likely to be a future danger. To reiterate:

- On direct examination, Dr. Quijano testified that "race" is one of seven "statistical factors we know to predict future dangerousness." JA 146a.

- On cross-examination, Dr. Quijano agreed with the prosecution that the "race factor, black, increases the future dangerousness for various complicated reasons." JA 170a.

- In his report, which was submitted to the jury, Dr. Quijano stated that Mr. Buck's "**Race**. Black" created an "Increased probability" that he would commit future acts of violence. JA 19a, 36a.

By presenting the jury with an expert opinion that Mr. Buck was more likely to commit criminal acts of violence because he is Black, and was therefore more deserving of a death sentence under Texas law, trial counsel rendered deficient performance under *Strickland*. In the District Court's words:

> Buck's counsel recklessly exposed his client to the risks of racial prejudice and introduced testimony that was contrary to his client's interests. His performance fell below an objective standard of reasonableness, and the Court therefore finds that trial counsel's performance was constitutionally deficient.

JA 264a.

B. The District Court Erred by Concluding that Mr. Buck Was Not Prejudiced by His Trial Counsel's Constitutionally Deficient Performance.

The touchstone of *Strickland*'s prejudice prong is whether counsel's constitutionally deficient performance "'deprive[d] the defendant of a fair trial, a trial whose result is reliable.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 687). "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694. Although the mere possibility of a different outcome is insufficient, the prejudice prong is satisfied when there is "a probability sufficient to undermine confidence in the outcome." *Id.*; *see also Harrington*, 562 U.S. at 112. Because Texas requires jury unanimity, a reasonable probability that one juror would have reached a different conclusion absent Dr. Quijano's race-as-dangerousness testimony is sufficient to establish prejudice. *See Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

Mr. Buck easily satisfies this standard. Contrary to the District Court's assertion that "any harm caused by [Dr. Quijano's] objectionable testimony was *de minimis*," JA 272a, it is well-settled that appeals to racial prejudice deprive the accused of his right to a fair trial decided by an impartial jury. The appeals to racial prejudice in this case were particularly harmful because: (1) they invoked the stereotype that Black people are more likely to be violent criminals; (2) they were presented as the professional opinion of a defense expert who was "appointed by Judge

Collins of the 208th District Court to do an evaluation on the defendant Duane Edward Buck" and was "paid by the County to do this work," JA 140a; and (3) the central disputed issue at sentencing was whether Mr. Buck was likely to be a future danger.

1. Dr. Quijano's Race-as-Dangerous Opinion Was Highly Prejudicial.

When jurors are told that the defendant's race is associated with criminality, the harm to the defendant is obvious and substantial. Such statements not only "'tend[] to create race prejudice,'" they "'convey[] the imputation that the accused belonged to a class of persons peculiarly'" predisposed to criminal behavior. *Allison v. State*, 248 S.W.2d 147, 148 (Tex. Crim. App. 1952) (citation omitted). This deprives the defendant of his fundamental right to a fair trial, i.e., one in which the "jury consider[s] only relevant and competent evidence," *Bruton v. United States*, 391 U.S. 123, 131 n.6 (1968), "free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability,'" *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (citations omitted). *Cf. Taylor v. Kentucky*, 436 U.S. 478, 487–88 (1978) (failure to provide a presumption of innocence instruction violated due process when, *inter alia*, the prosecutor's "repeated suggestions that petitioner's status as a defendant tended to establish his guilt created a genuine danger that the jury would convict petitioner on the basis of . . . extraneous considerations"). As Judge Winter has explained, the "[i]njection of a defendant's ethnicity into a trial as evidence of criminal behavior is self-evidently improper and prejudicial. . . ." *United States v. Cruz*, 981 F.2d 659, 664 (2d Cir. 1992).

The prejudice arising from Dr. Quijano's race-as-dangerousness opinion was magnified for two reasons. First, it was presented at a capital sentencing hearing where the false stereotype that "blacks are violence prone" poses a special risk of biasing the jury in favor of a death sentence. *Turner*, 476 U.S. at 35. That is particularly true when, as here, the central question for the jury at sentencing was whether Mr. Buck was likely to be a future danger.

Second, as Texas noted in its brief in opposition to certiorari, trial counsel elicited testimony "emphasiz[ing] Dr. Quijano's extensive experience, especially his tenure as Chief Psychologist and Director of Psychiatric Services for the Texas Department of Criminal Justice." Cert. Opp'n at 9. Counsel also imbued Dr. Quijano with the imprimatur of the court by eliciting testimony that Dr. Quijano was appointed by the presiding judge in the case "to do an evaluation" and was being paid by the county "to do this work." JA 140a.

Counsel thereby ensured that Dr. Quijano's opinions would "stand[] out" to the jury. *Satterwhite v. Texas*, 486 U.S. 249, 259 (1988); *see also Flores v. Johnson*, 210 F.3d 456, 466 (5th Cir. 2000) (Garza, J., specially concurring) (noting that a future dangerousness expert's "title and education (not to mention designation as an 'expert') gives him significant credibility in the eyes of the jury as one whose opinion comes with the imprimatur of scientific fact"). And, because Dr. Quijano was a defense expert, any opinion that supported the prosecution (i.e., his race-as-dangerousness testimony) surely made an even greater impression on the jury.

The District Court acknowledged that "[t]estimony like that of Dr. Quijano lends credence to any potential latent racial prejudice held by the jury." JA 264a. Nonetheless, the District Court determined that the introduction of Dr. Quijano's race-as-dangerousness opinion "was, in this case, *de minimis*" because he tendered that opinion only twice. *See* JA 259a, 272a.

The proffer by an "expert" of this racially-biased and discredited opinion before a jury even once would be sufficient to cause substantial harm. But, in this case, Dr. Quijano's race-as-dangerousness opinion was presented to the jury three times: once on direct examination, once on cross-examination, and once in Dr. Quijano's report that defense counsel submitted into evidence. That Dr. Quijano's opinion was not repeated a fourth time is hardly a reason to discount its significance. In the words of a juror who was later quoted by this Court: for certain things, "'[y]ou can't forget what you hear and see.'" *Irwin v. Dowd*, 366 U.S. 717, 728 (1961) (internal citation omitted). Or, as the Fifth Circuit has put it:

> [O]nce [certain] statements are made, the damage is hard to undo: Otherwise stated, one cannot unring a bell; after the thrust of the saber it is difficult to say forget the wound; and finally, if you throw a skunk into the jury box, you can't instruct the jury not to smell it.

United States v. Garza, 608 F.2d 659, 666 (5th Cir. 1979) (citation and internal quotations omitted).

For over a century, courts throughout this country have recognized that one cannot unring the bell with

respect to statements expressly appealing to race bias against criminal defendants. For example, in *Derrick*, the CCA held that a single question by the prosecutor appealing to jurors' racial biases was reversible error. 272 S.W. at 458. The trial court sustained an objection before the question was answered, but the CCA forcefully explained: "[W]e do not hesitate to say that it was utterly impossible for the court to destroy the virus that was spread by the very asking of the question," which was "so repulsive to every idea of a fair trial as to cause us to have no hesitancy in holding it reversible error." *Id.* at 45. Similarly, over 100 years ago, the Louisiana Supreme Court observed that the effects of a racial appeal during a criminal trial "having been once made, . . . cannot be counteracted by mere cautionary words of sober reason that may be uttered by the judge." *Louisiana v. Bessa*, 38 So. 985, 987 (La. 1905).

Numerous other decisions are in accord. *See, e.g., Reed v. State*, 99 So. 2d 455, 456 (Miss. 1958) (single remark that the defendant's race suggested future dangerousness was prejudicial); *Dinklage v. State*, 185 S.W.2d 573, 575 (Tex. Crim. App. 1945) (the "harmful effect" of two statements emphasizing the defendant's ethnic heritage "could not have been obliterated by the instruction of the court"); *Cofield v. State*, 82 S.E. 355, 356 (Ga. Ct. App. 1914) (single racial reference was "so prejudicial to the defendant's right to a fair trial as to have required the grant of a mistrial" because it "cannot be held to be effectively cured by a mere instruction on the part of the court to the jury to disregard it").

The age of these precedents reflects the fact that express appeals to racial bias are no longer likely to be

made in open court and are, for the most part, a relic of the past. But the principle that such appeals have no place in a fair trial must, of course, endure. Statements appealing to jurors' racial biases remain uniquely prejudicial, and they need not be repeated to require a new trial. *See, e.g., Bryant v. State*, 25 S.W.3d 924, 925 (Tex. Ct. App. 2000) (trial court abused its discretion in overruling a mistrial motion premised on a single question by a prosecutor that "would have served to aggravate any lingering prejudice against interracial couples among the jurors"); *Cruz*, 981 F.2d at 664 (1992) (reversing conviction based on, *inter alia*, "highly improper and prejudicial" expert testimony concerning the ethnic composition of an area in which drug transactions occurred); *Johnson v. Rose*, 546 F.2d 678, 679 (6th Cir. 1976) (granting writ of habeas corpus because brief racially-charged questions "so tainted the entire trial that it denied . . . defendants that fundamental fairness which is the essence of due process"); *United States v. Haynes*, 466 F.2d 1260, 1266–67 (5th Cir. 1972) (reversing conviction under plain error review based on a prosecutor's use of a racially-charged phrase during cross-examination; finding it was not enough that the district court had immediately instructed the jury to disregard the prosecutor's statement because of the likelihood that the jury could not disregard such a prejudicial and inflammatory remark).[6]

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[6] The same principle has been recognized in the civil context. *See Texas Emp'rs Ins. Ass'n v. Guerrero*, 800 S.W.2d 859, 863 (Tex. App. 1990) ("While most improper jury arguments can be cured by objection and instruction to disregard, appeals to racial prejudice are one of the exceptional kinds of argument that are considered incurable.").

In Mr. Buck's case, the false stereotype that "blacks are violence prone," *Turner*, 476 U.S. at 35, was expressly and repeatedly validated by a defense expert presented as worthy of appointment and compensation by the court. Far from having a "*de minimis*" effect, there is a reasonable probability that Dr. Quijano's race-as-dangerousness opinion "'sway[ed] the judgment of jurors'" in favor of death. *Miller-El*, 545 U.S. at 237 (citation omitted).

2. The Facts of the Crime Do Not Eclipse the Prejudice Caused by Counsel's Recklessly Exposing Mr. Buck to Racial Bias.

Equally unsupportable is the District Court's conclusion that the aggravating evidence overrides the harm caused by Dr. Quijano's race-as-dangerousness opinion. *See* JA 263a–265a, 272a–273a. The facts of the crime in this case are undeniably "horrific." JA 262a. Nevertheless, a death sentence was not a foregone conclusion.

This Court's precedent makes clear that a capital prisoner may establish *Strickland* prejudice even when a crime involves appalling facts. In *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam), Porter broke into his ex-girlfriend's home, shot and killed her and her new boyfriend, and pointed a gun at her daughter's head; Porter had repeatedly called his ex-girlfriend's family to tell them he would kill her. *See Porter v. Att'y Gen.*, 552 F.3d 1260, 1263 (11th Cir. 2008) (per curiam). Notwithstanding these egregious facts, this Court unanimously found that Porter was prejudiced by his counsel's deficient sentencing-phase performance, and that the state court's contrary conclusion was unreasonable within the meaning of 28

U.S.C. § 2254(d)(1) (an additional barrier to relief not present in Mr. Buck's case). *See Porter*, 558 U.S. at 40–44.

Similarly, in *Williams v. Taylor*, this Court found *Strickland* prejudice where the capital murder was "'just one act in a crime spree that lasted most of Williams's life,'" 529 U.S. 362, 418 (2000) (Rehnquist, C.J., dissenting) (citation omitted); *see id.* at 367–69, 398–99 (majority opinion). Williams's lack of remorse was evident: in the months after the capital offense, he committed two violent assaults on elderly victims, leaving one in a vegetative state. *See id.* at 367–69; *see also Sears v. Upton*, 561 U.S. 945, 956 (2010) (per curiam); *id.* at 964 (Scalia, J., dissenting) (vacating decision finding no *Strickland* prejudice where the defendant's confession showed a lack of remorse); *Satterwhite*, 486 U.S. at 258–59 (improper future dangerousness testimony prejudicial notwithstanding petitioner's substantial prior history of violence, including shooting a relative and the testimony of eight police officers indicating his reputation for violence).

The Fifth Circuit has similarly recognized that the brutality of a capital crime does not preclude a finding of *Strickland* prejudice, and has elaborated on this principle in the context of Texas cases. In *Walbey v. Quarterman*, 309 F. App'x 795 (5th Cir. 2009), the Court of Appeals granted sentencing relief under *Strickland*. In rejecting Texas's "'brutality trumps'" argument, the Court noted that it had reviewed "'scores of § 2254 habeas cases from the death row of Texas,'" which "'teach an obvious lesson that is frequently overlooked: Almost without exception, the cases we see in which conviction of a capital crime has produced a death sentence arise from extremely egregious, heinous, and shocking facts.'" *Id.*

at 804 (quoting *Gardner v. Johnson*, 247 F.3d 551, 563 (5th Cir. 2001)). The Court stressed, however, that Texas law does not permit the imposition of a "'death sentence solely because the facts are heinous and egregious.'" *Id.* Rather, Texas law—consistent with federal constitutional requirements—channels the jury's discretion by focusing it on "'the questions of deliberateness and future dangerousness.'" *Id.*

Here, the prosecution's case for death was not overwhelming under Texas law, as there was little record support for a finding that Mr. Buck would be dangerous if sentenced to life imprisonment. The prosecution presented no evidence that Mr. Buck had ever been violent outside the context of romantic relationships with two women, and jurors heard undisputed testimony that it was highly unlikely he would develop such a relationship in prison. *See* JA 73a, 75a; Tr. 192, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June 24, 2005), ECF No. 5-150 p. 24. The prosecution stressed Mr. Buck's lack of remorse in the immediate wake of the crime, but that alone could not prove that he was likely to commit future acts of violence.[7] Moreover, jurors knew Mr. Buck had shown remorse after having time to reflect on his actions. *See* JA 182a–183a (questioning by defense counsel indicating Mr. Buck displayed remorse by crying when witnesses testified).[8] This is significant

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[7] Lack of remorse evidence is relevant, but not dispositive, on the future dangerousness question under Texas law. *See, e.g.*, *Dewberry v. State*, 4 S.W.3d 735, 743 (Tex. Crim. App. 1999) ("Future dangerousness may be supported in part by evidence of a lack of remorse or contrition.").

[8] Mr. Buck's remorse is also confirmed by the declaration filed by another victim, his step-sister Phyllis Taylor, in state post-

because "[r]arely does a defendant have remorse for a crime he is presently committing. Almost always remorse occurs, if at all, sometime after the commission when the defendant had an opportunity to reflect on his criminal deed." *North Carolina v. Parker*, 315 N.C. 249, 257 (1985); *cf. Ex parte Williams*, No. AP-76455, 2012 WL 2130951, at *15 n.76 (Tex. Crim. App. June 3, 2012) ("Remorse can be mitigating because it shows that the defendant has changed—which is a core issue in the future dangerousness inquiry.").

By contrast, Mr. Buck presented substantial evidence that he was not likely to be violent in prison. The jurors heard undisputed testimony from Dr. Lawrence that Mr. Buck's prison records showed that he "did not present any problems in the prison setting," and, indeed, that he had been held in minimum security without incident. Tr. 196, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June 24, 2005), ECF No. 5-116, p. 13. Dr. Lawrence also testified without contradiction that every prison killing in Texas during the prior year was gang-related, and that there was no indication Mr. Buck had ever been a member of a gang or involved in any gang-related activity. Tr. 187, *id.* at p. 4.

The prosecution did not dispute any of this evidence. On cross-examination, the prosecutor elicited only that Dr. Lawrence "cannot guarantee . . . that [Mr. Buck] will never commit other violent acts." Tr. 213–14, *id.* at 30–31. That, of

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conviction proceedings. *See* Declaration of Phyllis Taylor, Exh. 76 to Application for Post-Conviction Writ of Habeas Corpus at 3, *Ex parte Duane Edward Buck*, No. WR-57004-03, 2013 WL 6081001 (Tex. Crim. App. Mar. 13, 2013). In her declaration, Ms. Taylor attests that, while awaiting trial, Mr. Buck sought and received her forgiveness.

course, is not the test, and it would have been irresponsible for any expert to make such a guarantee. The burden was on the prosecution to convince the jury—unanimously and beyond a reasonable doubt—that Mr. Buck was likely to commit future acts of criminal violence. The prosecution had little evidence on that point, which means a finding of prejudice due to trial counsel's deficient performance is more likely, not less. *See Strickland*, 466 U.S. at 696 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). Indeed, because there was little evidence that Mr. Buck was likely to be dangerous in prison, Dr. Quijano's false testimony that Black men are more likely to be dangerous was especially prejudicial.

The record of the jury's deliberations confirm that Mr. Buck was prejudiced by his counsel's deficient performance. It took two days for jurors to reach a decision about the special issues, during which time they sent four notes to the trial judge. One of those notes asked: "[C]an we talk about parole with a life imprisonment?" JA 207a.[9] Another note requested the psychological and police reports submitted during the sentencing phase. *See* JA 209a. These included Dr. Quijano's report, which stated that Mr. Buck's "**Race. Black**" meant an "Increased probability" of future dangerousness. JA 19a, 36a. The jury's deliberations make clear that a death sentence was by no means a foregone conclusion.

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[9] The jury was not given any information about parole. Under Texas law at the time of Mr. Buck's offense, if sentenced to life imprisonment, Mr. Buck would not have been eligible for parole for at least 40 years, at age 74. *See* Tr. 124–26, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June 24, 2005), ECF No. 5-114, pp.17–19.

See Parker v. Gladden, 385 U.S. 363, 365 (1966) (26-hour jury deliberations "indicat[ed] a difference among" the jurors, and supported the conclusion that defendant was prejudiced by extraneous statements made by the bailiff to the jury).

Strickland prejudice turns on whether the defendant's trial was fundamentally fair, 466 U.S. at 696, and "'fairness' cannot be stretched to the point of calling this a fair trial." *Kyles v. Whitley*, 514 U.S. 419, 454 (1995). A defense expert testified that Mr. Buck was more likely to commit future acts of criminal violence, and was therefore more deserving of a death sentence under Texas law, because he is Black. This Court cannot have confidence that the jury would have unanimously found future dangerousness absent Dr. Quijano's race-as-dangerousness opinion. At a minimum, these issues are debatable, requiring the issuance of a COA.

II. Mr. Buck is Entitled to a COA Because Jurists of Reason Would Find the District Court's Ruling on Mr. Buck's 60(b)(6) Motion Debatable or Wrong.

As detailed above, reasonable jurists would find the District Court's decision on Mr. Buck's underlying Sixth Amendment claim to be wrong or, at least, debatable. The remaining question is whether Mr. Buck has made the required showing under Rule 60(b)(6) to reopen the federal habeas judgment denying his IAC claim on procedural grounds. Because the facts and circumstances of Mr. Buck's case are uniquely extraordinary, he is entitled to 60(b)(6) relief. The District Court's conclusion to the contrary is wrong (and, at a minimum, debatable), and the Fifth Circuit erred in denying Mr. Buck a COA.

A. Requirements for Relief Under Rule 60(b)(6)

Rule 60(b)(6) allows a party to seek relief "from a final judgment, order, or proceeding" and request reopening of a case for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). This Rule "vests power in courts . . . to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 615 (1949). Indeed, Rule 60(b)(6) "reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233–34 (1995) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)).

District courts have jurisdiction to consider Rule 60(b) motions in habeas proceedings where, as here, such motions "attack[] not the substance of the federal court's resolution of the claim on the merits, but some defect in the integrity of the federal habeas proceeding." *Gonzalez*, 545 U.S. at 532. Thus, a Rule 60(b)(6) motion that asserts that "a previous ruling, which precluded a merits determination was in error— for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations"—is proper. *Gonzalez*, 545 U.S. at 532 n.4.

Mr. Buck's Rule 60(b)(6) motion meets this jurisdictional prerequisite because he contends that the District Court's prior denial of his IAC claim on procedural default grounds was in error. Under *Martinez* and *Trevino*, the unreasonable failure of Mr. Buck's

state habeas counsel to present the IAC claim in his initial state habeas application constitutes "cause" for overcoming the procedural default because trial counsel's error was so egregious that no reasonable post-conviction attorney could have overlooked it (much less waited two years after Texas publicly promised to concede error to raise such a claim). *See Detrich v. Ryan*, 740 F.3d 1237, 1246 (9th Cir. 2013) (post-conviction counsel's failure to raise a substantial claim establishes cause under *Martinez*); *see also ABA: Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, American Bar Association (1989) at 11.9.3(c), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/1989guidelines.authcheckdam.pdf ("Postconviction counsel should seek to present to the appropriate court or courts all arguably meritorious issues . . . .").[10]

Because Mr. Buck's Rule 60(b)(6) motion is jurisdictionally proper, the question is whether he has shown "'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). In evaluating extraordinariness, "it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Liljeberg v. Health Servs. Acquisition Corp.*,

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[10] Texas has not contested state habeas counsel's ineffectiveness. Although, as detailed above, state habeas counsel's failure is apparent, to the extent factual questions as to this (or any other issue) remain, they can and should be resolved at an evidentiary hearing.

486 U.S. 847, 866 (1988). This fact-intensive inquiry also involves an assessment of the applicant's diligence, the probable merit of the underlying claims, the interest in finality, and other equitable considerations. *See* 11 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2857 (2d ed. 1995 and Supp. 2004); *Gonzalez*, 545 U.S. at 540 (Stevens, J., dissenting) (collecting relevant factors).

Although this Court has noted that extraordinary "circumstances will rarely occur in the habeas context," *Gonzalez*, 545 U.S. at 535, as explained below—and previously recognized by Texas itself—this is one of those rare cases.

B. Mr. Buck's Case Is Extraordinary Within the Meaning of Rule 60(b)(6).

The eleven facts and circumstances proffered by Mr. Buck in his Rule 60(b) motion, JA 283a–285a, are precisely the type of equitable factors this Court has found to justify the reopening of a judgment. Mr. Buck has demonstrated that leaving the prior judgment against him intact risks a profound injustice in his case and undermines public confidence in the rule of law; that he has pursued his claims diligently; that his underlying constitutional claim has probable merit; and that the State's ordinary interest in the finality of a criminal judgment lacks force.

1. The Risk of Injustice to Mr. Buck

Mr. Buck faces execution pursuant to a death sentence whose legitimacy is undermined by expert testimony

that Mr. Buck is more deserving of a death sentence under Texas law because he is Black; by "a chronicle of inadequate representation at every stage of the proceedings";[11] and by Texas's failure to keep its promise to concede error in Mr. Buck's case. It is hard to conceive of a set of circumstances more likely to produce an unjust outcome.

As detailed above, and found by the District Court, Dr. Quijano's race-as-dangerousness testimony "lends credence to any potential latent racial prejudice held by the jury." JA 264a. Because "a juror who believes that blacks are violence prone . . . might well be influenced by that belief in deciding whether to impose death," *Turner*, 476 U.S. at 35, the introduction of Dr. Quijano's opinion at Mr. Buck's capital sentencing hearing creates a very real risk that the jury's future dangerousness decision—and, ultimately, Mr. Buck's death sentence—was based, at least in part, on a profoundly arbitrary and unconstitutional factor: race. The prospect of an execution tainted by racial bias is a quintessential example of injustice, and one that, respectfully, this Court cannot—and must not—tolerate. *See, e.g., United States v. Webster*, 162 F.3d 308, 356 (5th Cir. 1998) (recognizing that "a long line of Supreme Court precedent admonishes that the guillotine must be as color-blind as is the Constitution") (citations omitted).

The risk of injustice was compounded by the failures of Mr. Buck's trial and state post-conviction counsel. Mr. Buck's trial counsel turned the role of defense counsel on its head by introducing false and unconstitutional evidence

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[11] *Ex parte Buck*, 418 S.W.3d at 98.

that strongly supported the prosecution's case for death. And, although Mr. Buck's initial post-conviction counsel should have promptly presented trial counsel's error to the CCA for correction, he raised only meritless claims in the initial petition, and waited two years after the Attorney General publicly conceded error in Mr. Buck's case to raise an IAC claim based on the introduction of Dr. Quijano's opinion. By then, it was too late. As a result, no state court reviewed the merits of the IAC claim, and the federal habeas court that considered Mr. Buck's habeas petition in 2006 denied relief on procedural grounds.

Finally, after conceding error in this Court in *Saldaño*, Texas publicly promised to act similarly in six other cases, including Mr. Buck's, which it determined, after a thorough audit, were similar to Mr. Saldaño's. Texas kept its promise in every case except Mr. Buck's. It goes without saying that it is unjust for "virtually identically situated litigants [to be] treated in a needlessly disparate manner." *Roper v. Weaver*, 550 U.S. 598, 601 (2007). In Mr. Buck's case, such disparate treatment is extraordinarily unjust because Mr. Buck is now the only Texas prisoner to face execution pursuant to a death sentence that Texas has acknowledged is corrupted by racial bias.

2. *The Risk of Undermining Public Confidence in the Justice System and the Risk of Injustice in Other Cases*

This Court has repeatedly recognized that "active discrimination by litigants on the basis of [race] 'invites cynicism respecting the jury's neutrality and its obligation to adhere to the law.'" *JEB v. Alabama ex rel. T.B.*, 511 U.S. 127, 141 (1994) (quoting *Powers*, 499 U.S. at 412).

When racial discrimination enters the judicial process, it "ratif[ies] and reinforce[s] prejudicial views of the relative" characteristics of Black people and white people, *JEB*, 511 U.S. at 140, and thereby puts "the very integrity of the courts [in] jeopard[y]." *Miller-El*, 545 U.S. at 238. *See also Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (racial discrimination undermines "public confidence in the evenhanded administration of justice").

Dr. Quijano's race-as-dangerousness opinion had exactly this effect. To have such an opinion expressed by a court-appointed "expert," presented by court-appointed defense counsel, suggests that the criminal justice system itself endorses the false but pervasive belief in a link between Black men and violence. The risk of injustice to other cases, and to the rule of law itself, is profound. That is especially true because, notwithstanding this Court's "'unceasing efforts' to eradicate racial prejudice from our criminal justice system," *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (citation omitted), research shows that the perceived link between race and dangerousness persists and continues to jeopardize the fundamental fairness of the criminal justice system. *See, e.g.*, Jennifer L. Eberhardt, et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital Sentencing Outcomes* 384 (Cornell L. Fac. Publ'ns 2006), *available at* http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1040&context=lsrp_papers (finding that after controlling for case and individual differences, "defendants whose appearance was perceived as more stereotypically Black were more likely to receive a death sentence than defendants whose appearance was perceived as less stereotypically Black").

As noted above, in announcing its intention to concede error in Mr. Buck's case, Texas explained that "it is inappropriate to allow race to be considered as a factor in our criminal justice system," and declared that remedial action by the Attorney General was required because "[t]he people of Texas want and deserve a system that affords the same fairness to everyone." JA 213a. When, as here, the State reneges on its promise to correct a death sentence tainted by an "expert" opinion that Black men are more likely to be violent, and when the courts fail to intervene, the legitimacy of the justice system is demeaned. Moreover, permitting flagrantly disparate treatment of similarly-situated persons creates a serious risk of injustice in other cases. As the Court has stressed in discussing the circumstances warranting Rule 60(b)(6) relief: "We must continuously bear in mind that to perform its high function in the best way justice must satisfy the appearance of justice." *Liljeberg*, 486 U.S. at 864 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)) (internal quotations omitted).

3. The Probable Merit of Mr. Buck's Ineffectiveness Claim

As detailed above, Mr. Buck has presented a meritorious claim of ineffective assistance of counsel. The District Court recognized that Mr. Buck's trial counsel "recklessly exposed his client to the risks of racial prejudice and introduced testimony that was contrary to his client's interests." JA 264a. Mr. Buck was prejudiced by the introduction of this false and deeply inflammatory evidence because there is a reasonable probability of a different outcome had the jury not been tainted by it.

4. Texas's Interest in Finality

Under the unique circumstances of this case, Texas does not have a strong interest in the finality of the judgment denying federal habeas review of Mr. Buck's IAC claim. Procedural default rules "serve vital purposes," *Murray v. Carrier*, 477 U.S. 478, 490 (1986), including "promot[ing] not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions," *id.* at 491 (quoting *Reed v. Ross*, 468 U.S. 1, 10–11 (1984)). However, those interests are diminished here for two reasons.

First, judicial review of ineffective assistance of trial counsel claims is essential to the integrity of the criminal justice system because "[t]he right to the effective assistance of counsel [at trial] is . . . the foundation for our adversary system." *Martinez*, 132 S. Ct. at 1317. Thus, this Court has held that equity allows federal habeas courts to overcome the State's interest in enforcing a procedural default if "the initial-review collateral proceeding . . . with ineffective counsel[ ] may not have been sufficient to ensure that proper consideration [is] given to a substantial claim." *Id.* at 1318. Because these are precisely the circumstances presented by Mr. Buck, Texas's interest in the finality of the District Court's pre-*Trevino* denial of habeas relief is significantly diminished.

Second, as Texas itself previously recognized, this is the rare case in which the nature of the trial error—the introduction of express racial bias that not only denies Mr. Buck a fair trial but also compromises the rule of law—renders finality an insufficient ground upon which to justify reliance on procedural default. For these very reasons, Texas rightly promised to concede error in the

six similar-to-*Saldaño* cases, and it waived procedural defenses in five of those cases. A state has no legitimate interest in a death sentence that it has recognized was corrupted by racial bias. *See Welch v. United States*, 136 S. Ct. 1257, 1266 (2016) ("'[T]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.'") (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J.)).

Even though Texas has now reneged on its promise, its sole articulated bases for that reversal of position are that (1) defense counsel (and not the prosecutor) were responsible for the introduction of the unconstitutional race-as-dangerousness testimony and expert report, and (2) initial post-conviction counsel failed to raise a timely Sixth Amendment challenge to trial counsel's conduct. Cert. Opp'n at 12, 16, 20–21. Putting aside the fact that Texas knew what happened at Mr. Buck's trial when it promised not to raise procedural defenses in his case, Texas simply relies on the very interests that *Martinez* holds can be overcome by the presentation of a "substantial" claim of trial counsel ineffectiveness, like the one in this case.

5. Mr. Buck's Diligence

Mr. Buck has diligently pursued relief on his ineffective assistance of counsel claim. When *Trevino* was announced, Mr. Buck had a state habeas application pending before the CCA. Because, under Texas law, the immediate filing of a Rule 60(b) motion in federal court could have precipitated the dismissal of Mr. Buck's pending application, *see Ex parte Hernandez*, No. WR-63,282-02 (Tex Crim. App. Nov. 25, 2009), Mr. Buck waited until the CCA adjudicated

his application, and then promptly filed his Rule 60(b)(6) motion in federal court. This prompt filing demonstrates Mr. Buck's diligence.

6. Conclusion

For all of the foregoing reasons, Mr. Buck's case presents exactly the kind of rare, unique and extraordinary circumstances for which Rule 60(b)(6) relief was intended.

C. Reasonable Jurists Could Conclude that the Lower Courts' Denial of Mr. Buck's Application for Rule 60(b)(6) Relief Was Debatable or Wrong.

As the foregoing discussion demonstrates, Mr. Buck's case meets the requirements for Rule 60(b)(6) relief. Although the District Court's contrary conclusion is reviewed under the abuse-of-discretion standard, a district court necessarily abuses its discretion when its judgment is based on an error of law, *see Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 386 (1990), or when its analysis is inconsistent with the objectives of the relevant statute or rule, *see Albermarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975). Here, the District Court made several errors of law, and its analysis is inconsistent with Rule 60(b)'s fundamental objective of providing a vehicle for vacating judgments when justice so requires. *See Liljeberg*, 486 U.S. at 864. At a minimum, reasonable jurists could so conclude, thereby warranting a COA.

First, the District Court addressed the circumstances identified by Mr. Buck individually, JA 257a–260a, but—contrary to the holistic, equitable inquiry mandated by Rule

60(b)—it never analyzed whether "collectively [Mr. Buck's evidence establishes] extraordinary circumstances." *Ramirez v. United States*, 799 F.3d 845, 851 (7th Cir. 2015); *see Klapprott*, 335 U.S. at 615 (analyzing circumstances collectively in concluding that reopening the judgment was appropriate under Rule 60(b)).

Second, although the District Court recognized that "[Mr.] Buck's counsel recklessly exposed his client to the risks of racial prejudice," JA 264a, the court concluded that counsel's conduct did not support Rule 60(b)(6) relief because it had only a "*de minimis*" impact at sentencing, JA 259a. However, as detailed in Section I, *infra*, precedent from this Court and numerous other courts—dating back over a century—establishes that statements appealing to jurors' racial biases in a criminal trial are profoundly prejudicial. That prejudice is especially clear when, as here, race-as-dangerousness testimony by a defense expert at a capital sentencing proceeding is at issue.

Third, the District Court improperly disregarded the facts that Texas promised to concede constitutional error in six cases, including Mr. Buck's, and then broke that promise in only Mr. Buck's case. JA 260a. After a "thorough audit" of cases, Texas's Attorney General determined that Mr. Buck's case was one of six that were similar to *Saldaño*, meaning that Dr. Quijano's race-as-dangerousness testimony had fundamentally tainted his death sentence. JA 213a. The District Court erred by disregarding these extraordinary circumstances simply because Texas later changed its mind. Indeed, although Texas now contends there is a distinction between Mr. Buck's case and the others based on defense counsel's role in presenting Dr. Quijano's testimony, that distinction is

irrelevant to the reason Texas identified as requiring it to concede error in the first place, i.e., ensuring public confidence that the judicial system will not tolerate death sentences tainted by racial bias. *See Roper*, 550 U.S. at 601 (noting that "virtually identically situated litigants" should not be "treated in a needlessly disparate manner").

Fourth, the District Court held that the fact that it had previously denied Mr. Buck's IAC claim as procedurally defaulted was immaterial to the Rule 60(b) analysis. JA 259a–260a. However, because "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system," the denial of review of a "substantial" claim of ineffective assistance of trial counsel is "of particular concern." *Martinez*, 132 S. Ct. at 1317 (citing *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)). This same principle is applicable in the Rule 60(b) context.

To be sure, not every case involving a viable *Martinez* claim may justify reopening the judgment under Rule 60(b). *See Agostini v. Felton*, 521 U.S. 203, 239 (1997) (noting "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)"). But *Martinez* is a relevant factor to be considered as part of the holistic review mandated by this Court's precedent. *See Klapprott*, 335 U.S. at 615; *see also Gonzalez*, 545 U.S. at 537 (examining both a change in decisional law and the distinctive facts of the case to determine whether the petitioner demonstrated an entitlement to 60(b)(6) relief).

In sum, reasonable jurists could surely find that the District Court's denial of Rule 60(b) relief rests on one or more legal errors, or otherwise constitutes an abuse

of discretion. A COA was therefore required. *See Miller-El*, 537 U.S. at 340 ("In the context of th[is] threshold examination . . . [,] the issuance of a COA can be supported by *any evidence* demonstrating an entitlement to relief.") (emphasis added).

The Fifth Circuit, however, denied a COA, insisting that Mr. Buck's "IAC claim . . . is at least unremarkable as far as IAC claims go," and that the circumstances identified by Mr. Buck were "not extraordinary at all in the habeas context." JA 285a. It stretches credulity to characterize Mr. Buck's IAC claim as run-of-the-mill. To reach that conclusion, the Fifth Circuit had to ignore the racial bias at the heart of Mr. Buck's case, as well as this Court's repeated admonitions about the profoundly prejudicial nature of racial discrimination in the criminal justice system, which undermines "public confidence in the evenhanded administration of justice." *Davis*, 135 S. Ct. at 2208.

By failing to "give full consideration to the substantial evidence" of extraordinariness presented by Mr. Buck, the Fifth Circuit repeated an error in its COA analysis that this Court previously corrected. *See Miller-El*, 537 U.S. at 341; *see also* Appendix A at 3a (noting that, in the Fifth Circuit, over the last five years, a COA was denied on all claims in capital § 2254 cases by both the district court and the court of appeals 59% of the time; during that same period, a COA was denied on all claims by both the district court and court of appeals in only 6.25% of such cases in the Eleventh Circuit and 0% of such cases in the Fourth Circuit). Furthermore, the Fifth Circuit's denial of a COA conflicts with other evidence that reasonable jurists could disagree with the District Court's decision:

specifically, two appellate courts have concluded that the change in procedural default law caused by *Martinez* and *Trevino* is a relevant factor under Rule 60(b)(6), *see Cox v. Horn*, 757 F.3d 113, 122 (3d Cir. 2014); *Ramirez*, 799 F.3d at 850; and two Justices of this Court previously concluded that a COA was warranted in Mr. Buck's case, *see Buck v. Thaler*, 132 S.Ct. at 37 (Sotomayor, J., joined by Kagan, J., dissenting).

The Fifth Circuit panel also improperly excluded Texas's broken promise from its extraordinariness analysis. Although it acknowledged that such evidence is "odd and factually unusual," it concluded that "extraordinary circumstances are not merely found on the spectrum of common circumstances to unique circumstances." JA 286a. The panel cited no support for this *ipse dixit*, and failed to acknowledge that the difference, if any, between an "odd and factually unusual" circumstance and an "extraordinary" circumstance is precisely the kind of issue that could be debated by reasonable jurists.

The panel further concluded that Mr. Buck failed to demonstrate detrimental reliance on the broken promise. *Id.* However, as explained above, "[i]rrespective of whether the evidence could prove sufficient to support" a claim for relief, *Miller-El*, 537 U.S. at 347, Texas's broken promise is, in and of itself, extraordinary. It leaves Mr. Buck as the only prisoner in Texas to face execution pursuant to a death sentence that Texas had declared to be illegitimate. Such a racially tainted death sentence calls the rule of law itself into question.

CONCLUSION

For all of the reasons detailed above, Mr. Buck's case is extraordinary, and he has demonstrated his entitlement to relief under Rule 60(b)(6). The lower courts' decisions to the contrary are in error or, at a minimum, debatable amongst jurists of reason. Mr. Buck is entitled to a COA.

Respectfully submitted,

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APPENDIX

CERTIFICATES OF APPEALABILITY IN THE FOURTH, FIFTH AND ELEVENTH CIRCUIT CHART SINCE JANUARY 1, 2011

CERTIFICATE OF APPEALABILITY REVIEW

Undersigned counsel, with research assistance from two students at Columbia Law School, Rachel M. Wagner and Andrew J. Simpson, reviewed electronically available opinions and orders from the United States Courts of Appeals for the Fourth, Fifth and Eleventh Circuits, published and unpublished, on or after January 1, 2011, in which a petitioner sought relief from his or her death sentence under 28 U.S.C. § 2254 and a motion for a Certificate of Appealability ("COA") was decided within the circuit.

Undersigned counsel used the Westlaw database, an online legal research service, to input search terms and retrieve the relevant cases. The first set of search terms were as follows: (1) (capital /s habeas) & 2254 & "certificate #of appealability"; (2) capital /25 2254 & "certificate #of appealability"; (3) (death /2 penalty) & 2254 & "certificate #of appealability"; (4) (capital /s habeas) & 2254 /50 "COA"; (5) (capital /25 2254) /50 "COA"; and (6) (death /2 penalty) & 2254 /50 "COA." These searches were narrowed to the Fourth, Fifth and Eleventh Circuits and by the relevant time period.

To ensure an exhaustive search, undersigned counsel also ran a search within a collection of cases tagged by Westlaw as concerning Certificates of Appealability (Westlaw assigns these cases with an internal number - 197k818). Within this section, a broad search for the terms "capital

& 2254" and "death & 2254" was run in the Fourth, Fifth and Eleventh Circuit Courts, during the relevant time period. This uncovered a small number of additional cases.

After the cases were retrieved, undersigned counsel reviewed the cases to ensure they fit the criteria identified above (i.e., a capital case under 28 U.S.C. § 2254 in which the petitioner was under a death sentence and a motion for a COA was decided). Cases that were false hits were removed from consideration.

In the below chart, any case in which either the district court or the Court of Appeals granted a COA on any claim is listed as "Granted." If no court granted a COA on any claim, the case is listed as "Denied." If the Court of Appeals either granted a COA when the district court had denied a COA on all claims, or if the Court of Appeals expanded a COA granted by the district court, the case is described as "Granted, Circuit." If the district court is the only court that granted a COA, the case is described as "Granted, District." When a petitioner sought a COA on more than one occasion during the course of his federal appeals and two separate opinions were issued by the Court of Appeals during the relevant time period, those cases are listed separately.

Our review was limited to the electronically available opinions issued by the Court of Appeals during the last five years; the district court rulings were determined based on the procedural history in the Court of Appeals' opinion. With respect to the time frame, the only consideration was whether the Court of Appeals issued its decision within the

last five years, regardless of whether or not the district court had also issued its decision within the last five years.

Based on the this review, a COA was denied on all claims in 58.9% (76 out of 129) of the cases arising out of the Fifth Circuit, while a COA was only denied in 6.3% (7 out of 111) and 0% of the cases arising out of the Eleventh and Fourth Circuits respectively.

Fourth Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Atkins, Randy	4th	*Atkins v. Lassiter*, 502 F.App'x. 244, 245 (4th Cir. 2012)	Granted, Circuit
Barnes, William	4th	*Barnes v. Joyner*, 751 F.3d 229, 232 (4th Cir. 2014)	Granted, District
Elmore, Edward	4th	*Elmore v. Ozmint*, 661 F.3d 783, 788 (4th Cir. 2011), as amended (Dec. 12, 2012)	Granted, District
Fowler, Elrico	4th	*Fowler v. Joyner*, 753 F.3d 446, 453 (4th Cir. 2014)	Granted, Circuit

Gray, Ricky	4th	*Gray v. Zook*, 806 F.3d 783, 790 (4th Cir. 2015)	Granted, District
Gray, Ricky	4th	*Gray v. Pearson*, 526 F.App'x 331, 332 (4th Cir. 2013)	Granted, District
Hurst, Jason	4th	*Hurst v. Joyner*, 757 F.3d 389, 394 (4th Cir. 2014)	Granted, District
Johnson, Shermaine	4th	*Johnson v. Ponton*, 780 F.3d 219, 222 (4th Cir. 2015)	Granted, District
Porter, Thomas	4th	*Porter v. Zook*, 803 F.3d 694, 696 (4th Cir. 2015)	Granted, District
Prieto, Alfredo	4th	*Prieto v. Zook*, 791 F.3d 465, 467 (4th Cir. 2015	Granted, Circuit
Richardson, Timothy	4th	*Richardson v. Branker*, 668 F.3d 128, 137 (4th Cir. 2012)	Granted, District
Teleguz, Ivan	4th	*Teleguz v. Pearson*, 689 F.3d 322, 325 (4th Cir. 2012)	Granted, Circuit
		Total Granted:	**12 (100%)**
		Total Denied:	**0 (0%)**

Fifth Circuit[1]

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Adams, Beunka	5th	*Adams v. Thaler*, 421 F.App'x 322, 324 (5th Cir. 2011)	Granted, District
Allen, Guy Len	5th	*Allen v. Stephens*, 619 F.App'x 280, 281 (5th Cir. 2015)	Denied
Allen, Kerry Dimart	5th	*Allen v. Stephens*, 805 F.3d 617, 622 (5th Cir. 2015)	Denied
Ayestas, Carlos Manuel	5th	*Ayestas v. Thaler*, 462 F.App'x 474, 476 (5th Cir. 2012)	Denied
Basso, Suzanne Margaret	5th	*Basso v. Stephens*, 555 F.App'x 335, 337 (5th Cir. 2014)	Denied
Battaglia, John David	5th	*Battaglia v. Stephens*, 621 F.App'x 781, 787 (5th Cir. 2015)	Denied

1. In *Charles v. Stephens*, the Fifth Circuit held that it had jurisdiction over petitioner's motion, although the district court denied his request for a COA, because a denial of a motion under 18 U.S.C. § 3599(f) is an appealable order and not subject to the COA requirement. 612 F.App'x 214, 217 (5th Cir. 2015). Therefore, even though the district court "denied" petitioner's COA, we have not listed this case in the chart or counted it in the tally of cases.

Beatty, Tracy Lane	5th	*Beatty v. Stephens*, 759 F.3d 455, 458 (5th Cir. 2014)	Denied
Bigby, James Eugene	5th	*Bigby v. Stephens*, 595 F.App'x 350, 351 (5th Cir. 2014)	Denied
Blue, Carl Henry	5th	*Blue v. Thaler*, 665 F.3d 647, 670 (5th Cir. 2011)	Denied
Bower, Lester Leroy	5th	*In re Bower*, 612 F.App'x 748, 750 (5th Cir. 2015)	Denied
Brawner, Jan Michael	5th	*Brawner v. Epps*, 439 F.App'x 396, 398 (5th Cir. 2011)	Denied
Braziel, Alvin Avon Jr.	5th	*Braziel v. Stephens*, No. 15-70018, 2015 WL 7729400, at *1 (5th Cir. Nov. 30, 2015)	Denied
Brown, Arthur	5th	*Brown v. Thaler*, 684 F.3d 482, 486 (5th Cir. 2012)	Denied
Burton, Arthur Lee	5th	*Burton v. Stephens*, 543 F.App'x 451, 453 (5th Cir. 2013)	Denied
Butler, Steven Anthony	5th	*Butler v. Stephens*, No. 09-70003, 2015 WL 5235206, at *4 (5th Cir. Sept. 9, 2015)	Granted, Circuit

Byrom, Michelle	5th	*Byrom v. Epps*, 518 F.App'x 243, 244 (5th Cir. 2013)	Granted, District
Canales, Anibal	5th	*Canales v. Stephens*, 765 F.3d 551, 559 (5th Cir. 2014)	Granted, District
Cantu, Ivan Abner	5th	*Cantu v. Thaler*, 632 F.3d 157, 162 (5th Cir. 2011)	Granted, District
Carter, Tilon Lashon	5th	*Carter v. Stephens*, 805 F.3d 552, 553 (5th Cir. 2015)	Denied
Charles, Derrick Dewayne	5th	*Charles v. Stephens*, 736 F.3d 380, 383 (5th Cir. 2013)	Granted, District
Chester, Elroy	5th	*Chester v. Thaler*, 666 F.3d 340, 356 fn. 7 (5th Cir. 2011)	Granted, District
Clark, Troy	5th	*Clark v. Stephens*, No. 14-70034, 2015 WL 5730638, at *4 (5th Cir. Oct. 1, 2015)	Granted, Circuit
Clark, Troy	5th	*Clark v. Thaler*, 673 F.3d 410, 413 (5th Cir. 2012)	Granted, District
Cobb, Richard Aaron	5th	*Cobb v. Thaler*, 682 F.3d 364, 367 (5th Cir. 2012)	Granted, District

Coleman, Lisa Ann	5th	*In re Coleman*, 768 F.3d 367, 369 (5th Cir. 2014)	Denied
Coleman, Lisa Ann	5th	*Coleman v. Thaler*, 716 F.3d 895, 898 (5th Cir. 2013)	Denied
Craig, Dale Dwayne	5th	*Craig v. Cain*, No. 12-30035, 2013 WL 69128, at *1 (5th Cir. Jan. 4, 2013)	Denied
Crawford, Charles Ray	5th	*Crawford v. Epps*, 531 F.App'x 511, 516 (5th Cir. 2013)	Granted, District
Crutsinger, Billy Jack	5th	*Crutsinger v. Stephens*, 576 F.App'x 422, 424 (5th Cir. 2014)	Denied
Doyle, Anthony Dewayne	5th	*Doyle v. Stephens*, 535 F.App'x 391, 392 (5th Cir. 2013)	Denied
Druery, Marcus Ray Tyrone	5th	*Druery v. Thaler*, 647 F.3d 535, 537 (5th Cir. 2011)	Denied
Eldridge, Gerald Cornelius	5th	*Eldridge v. Stephens*, 608 F.App'x 289, 289 (5th Cir. 2015)	Granted, Circuit
Escamilla, Licho	5th	*Escamilla v. Stephens*, 602 F.App'x 939, 940 (5th Cir. 2015)	Granted, Circuit

Escamilla, Licho	5th	*Escamilla v. Stephens*, 749 F.3d 380, 383 (5th Cir. 2014)	Granted, Circuit
Feldman, Douglas Alan	5th	*Feldman v. Thaler*, 695 F.3d 372, 377 (5th Cir. 2012)	Denied
Freeman, James Garrett	5th	*Freeman v. Stephens*, 614 F.App'x 180, 181 (5th Cir. 2015)	Denied
Garcia, Humberto Leal	5th	*Garcia v. Thaler*, 440 F.App'x 232, 233 (5th Cir. 2011)	Denied
Garcia, Gustavo Julian	5th	*Garcia v. Stephens*, 793 F.3d 513, 515 (5th Cir. 2015)	Denied
Garcia, Juan Martin	5th	*Garcia v. Stephens*, 757 F.3d 220, 221 (5th Cir. 2014)	Denied
Garza, Joe Franco	5th	*Garza v. Stephens*, 575 F.App'x 404, 406 (5th Cir. 2014)	Denied
Garza, Manuel	5th	*Garza v. Stephens*, 738 F.3d 669, 672 (5th Cir. 2013)	Denied
Garza, Robert Gene	5th	*Garza v. Thaler*, 487 F.App'x 907, 908 (5th Cir. 2012)	Denied
Gates, Bill Douglas	5th	*Gates v. Thaler*, 476 F.App'x 336, 337 (5th Cir. 2012)	Denied

Gonzales, Ramiro	5th	*Gonzales v. Stephens*, 606 F.App'x 767, 768 (5th Cir. 2015)	Denied
Guevara, Gilmar Alexander	5th	*Guevara v. Stephens*, 577 F.App'x 364, 366 (5th Cir. 2014)	Denied
Gutierrez, Ruben	5th	*Gutierrez v. Stephens*, 590 F.App'x 371, 373 (5th Cir. 2014)	Denied
Hall, Justen	5th	*Hall v. Thaler*, 504 F.App'x 269, 270 (5th Cir. 2012)	Denied
Harris, Robert Wayne	5th	*Harris v. Thaler*, 464 F.App'x 301, 303 (5th Cir. 2012)	Denied
Haynes, Anthony Cardell	5th	*Haynes v. Thaler*, 438 F.App'x 324, 326 (5th Cir. 2011)	Granted, Circuit
Hearn, Yokamon Laneal	5th	*Hearn v. Thaler*, 669 F.3d 265, 267 (5th Cir. 2012)	Denied
Henderson, James Lee	5th	*Henderson v. Stephens*, 791 F.3d 567, 577 (5th Cir. 2015)	Granted, District
Hernandez, Ramiro	5th	*Hernandez v. Stephens*, 537 F.App'x 531, 533 (5th Cir. 2013)	Granted, District

Hines, Bobby Lee	5th	*Hines v. Thaler*, 456 F.App'x 357, 358 (5th Cir. 2011)	Denied
Hoffman, Jessie	5th	*Hoffman v. Cain*, 752 F.3d 430, 434 (5th Cir. 2014)	Granted, District
Holiday, Raphael Deon	5th	*Holiday v. Stephens*, 587 F.App'x 767, 790 (5th Cir. 2014)	Denied
Ibarra, Ramiro Rubi	5th	*Ibarra v. Thaler*, 691 F.3d 677, 679 (5th Cir. 2012)	Denied
Ibarra, Ramiro Rubi	5th	*Ibarra v. Stephens*, 723 F.3d 599, 600 (5th Cir. 2013)	Granted, Circuit
Jackson, Henry Curtis	5th	*Jackson v. Epps*, 447 F.App'x 535, 537 (5th Cir. 2011)	Granted, District
Jasper, Ray	5th	*In re Jasper*, 559 F.App'x 366, 368 (5th Cir. 2014)	Granted, Circuit
Jasper, Ray	5th	*Jasper v. Thaler*, 466 F.App'x 429, 430 (5th Cir. 2012)	Granted, District
Jennings, Robert Mitchell	5th	*Jennings v. Stephens*, 537 F.App'x 326, 339 (5th Cir. 2013)	Denied
Johnson, Dexter	5th	*Johnson v. Stephens*, 617 F.App'x 293, 295 (5th Cir. 2015)	Granted, District

Jones, Shelton Denoria	5th	*Jones v. Stephens*, 612 F.App'x 723, 724 (5th Cir. 2015)	Granted, District
Jones, Shelton Denoria	5th	*Jones v. Stephens*, 541 F.App'x 399, 400 (5th Cir. 2013)	Denied
Jordan, Richard	5th	*Jordan v. Epps*, 756 F.3d 395, 398 (5th Cir. 2014)	Denied
Ladd, Robert Charles	5th	*Ladd v. Stephens*, 748 F.3d 637, 639 (5th Cir. 2014)	Granted, District
Lewis, Rickey Lynn	5th	*Lewis v. Thaler*, 701 F.3d 783, 785 (5th Cir. 2012)	Granted, District
Loden, Thomas Edwin	5th	*Loden v. McCarty*, 778 F.3d 484, 493 (5th Cir. 2015)	Granted, District
Manning, Willie Jerome	5th	*Manning v. Epps*, 688 F.3d 177, 180 (5th Cir. 2012)	Granted, District
Masterson, Richard Allen	5th	*Masterson v. Stephens*, 596 F.App'x 282, 284 (5th Cir. 2015)	Denied
Matamoros, John Reyes	5th	*Matamoros v. Stephens*, 783 F.3d 212, 213 (5th Cir. 2015)	Granted, Circuit

Matamoros, John Reyes	5th	*Matamoros v. Stephens*, 539 F.App'x 487, 489 (5th Cir. 2013)	Granted, Circuit
Mays, Randall Wayne	5th	*Mays v. Stephens*, 757 F.3d 211, 212 (5th Cir. 2014)	Denied
McCarthy, Kimberly Lagayle	5th	*McCarthy v. Thaler*, 482 F.App'x 898, 899 (5th Cir. 2012)	Denied
McCoskey, Jamie Bruce	5th	*McCoskey v. Thaler*, 478 F.App'x 143, 145 (5th Cir. 2012)	Granted, District
McGowan, Roger Wayne	5th	*McGowen v. Thaler*, 675 F.3d 482, 503 (5th Cir. 2012)	Denied
Mendoza, Moises Sandoval	5th	*Mendoza v. Stephens*, 783 F.3d 203, 209 (5th Cir. 2015)	Granted, District
Mitchell, William Gerald	5th	*Mitchell v. Epps*, 641 F.3d 134, 139 (5th Cir. 2011)	Denied
Newbury, Donald Keith	5th	*Newbury v. Stephens*, 756 F.3d 850, 853 (5th Cir. 2014)	Denied
Newbury, Donald Keith	5th	*Newbury v. Thaler*, 437 F.App'x 290, 292 (5th Cir. 2011)	Denied

Osborne, Emerson	5th	*Osborne v. King*, 617 F.App'x 308, 309 (5th Cir.)	Granted, District
Parr, Carroll	5th	*Parr v. Thaler*, 481 F.App'x 872, 874 (5th Cir. 2012)	Denied
Panetti, Scott Louis	5th	*Panetti v. Stephens*, 727 F.3d 398, 400 (5th Cir. 2013)	Granted, District
Paredes, Miguel	5th	*In re Paredes*, 587 F.App'x 805, 807 (5th Cir. 2014)	Denied
Perez, Louis Castro	5th	*Perez v. Stephens*, 784 F.3d 276, 278 (5th Cir. 2015)	Denied
Perez, Louis Castro	5th	*Perez v. Stephens*, 745 F.3d 174, 176 (5th Cir. 2014)	Denied
Pruett, Robert Lynn	5th	*Pruett v. Thaler*, 455 F.App'x 478, 479 (5th Cir. 2011)	Granted, District
Puckett, Larry Matthew	5th	*Puckett v. Epps*, 641 F.3d 657, 658-59 (5th Cir. 2011)	Granted, Circuit
Quintanilla, John Manuel	5th	*Quintanilla v. Thaler*, 443 F.App'x 919, 920 (5th Cir. 2011)	Denied
Rayford, William Earl	5th	*Rayford v. Stephens*, 622 F.App'x 315, 316 (5th Cir. 2015)	Denied

Reed, Rodney	5th	*Reed v. Stephens*, 739 F.3d 753, 760 (5th Cir. 2014)	Denied
Ripkowski, Britt Allen	5th	*Ripkowski v. Thaler*, 438 F.App'x 296, 300 (5th Cir. 2011)	Granted, District
Rivas, George	5th	*Rivas v. Thaler*, 432 F.App'x 395, 396 (5th Cir. 2011)	Denied
Roberson, Robert Leslie	5th	*Roberson v. Stephens*, 614 F.App'x 124, 125 (5th Cir. 2015)	Granted, Circuit
Roberts, Donnie Lee	5th	*Roberts v. Thaler*, 681 F.3d 597, 602 (5th Cir. 2012)	Granted, District
Ross, Vaughn	5th	*Ross v. Thaler*, 511 F.App'x 293, 294 (5th Cir. 2013)	Denied
Ruiz, Rolando	5th	*Ruiz v. Stephens*, 728 F.3d 416, 418 (5th Cir. 2013)	Denied
Russeau, Gregory	5th	*Russeau v. Stephens*, 559 F.App'x 342, 348 (5th Cir. 2014)	Granted, District
Sells, Tommy Lynn	5th	*Sells v. Stephens*, 536 F.App'x 483, 484 (5th Cir. 2013)	Denied
Simmons, Donald Ray	5th	*Simmons v. Thaler*, 440 F.App'x 237, 238 (5th Cir. 2011)	Granted, Circuit

Simmons, Gary Carl	5th	*Simmons v. Epps*, 654 F.3d 526, 533 (5th Cir. 2011)	Granted, Circuit
Simon, Robert	5th	*Simon v. Epps*, 463 F.App'x 339, 340 (5th Cir. 2012)	Granted, District
Sprouse, Kent William	5th	*Sprouse v. Stephens*, 748 F.3d 609, 615 (5th Cir. 2014)	Granted, District
Storey, William	5th	*Storey v. Stephens*, 606 F.App'x 192, 193 (5th Cir. 2015)	Denied
Swain, Mario	5th	*Swain v. Thaler*, 466 F.App'x 393, 394 (5th Cir. 2012)	Granted, District
Tabler, Richard Lee	5th	*Tabler v. Stephens*, 588 F.App'x 297, 298 (5th Cir. 2014)	Denied
Tamayo, Edgar Arias	5th	*Tamayo v. Stephens*, 740 F.3d 991, 992 (5th Cir. 2014)	Denied
Tamayo, Edgar Arias	5th	*Tamayo v. Stephens*, 740 F.3d 986, 987 (5th Cir. 2014)	Granted, District
Tercero, Bernardo Aban	5th	*Tercero v. Stephens*, 738 F.3d 141, 143 (5th Cir. 2013)	Denied
Threadgill, Ronnie Paul	5th	*In re Threadgill*, 522 F.App'x 236, 238 (5th Cir. 2013)	Denied

Threadgill, Ronnie Paul	5th	*Threadgill v. Thaler*, 425 F.App'x 298, 299 (5th Cir. 2011)	Granted, District
Trevino, Carlos	5th	*Trevino v. Thaler*, 449 F.App'x 415, 416 (5th Cir. 2011)	Granted, District
Trottie, Willie Tyrone	5th	*Trottie v. Stephens*, 720 F.3d 231, 237 (5th Cir. 2013)	Denied
Trottie, Willie Tyrone	5th	*Trottie v. Stephens*, 581 F.App'x 436, 437 (5th Cir. 2014)	Denied
Turner, Edwin Hart	5th	*Turner v. Epps*, 12 F.App'x 696, 698 (5th Cir. 2011)	Denied
Vasquez, Manuel	5th	*Vasquez v. Thaler*, 505 F.App'x 319, 323 (5th Cir. 2013)	Denied
Villanueva, Jorge	5th	*Villanueva v. Stephens*, 555 F.App'x 300, 309 (5th Cir. 2014)	Granted, Circuit
Ward, Adam Kelly	5th	*Ward v. Stephens*, 777 F.3d 250, 253 (5th Cir. 2015)	Denied
Washington, Willie Terion	5th	*Washington v. Stephens*, 551 F.App'x 122, 123 (5th Cir. 2014)	Granted, Circuit

White, Garcia Glenn	5th	*In re White*, 602 F.App'x 954, 957 (5th Cir. 2015)	Denied
White, Garcia Glenn	5th	*White v. Thaler*, 522 F.App'x 236, 238 (5th Cir. 2013)	Denied
Wilkins, Christopher Chubasco	5th	*Wilkins v. Stephens*, 560 F.App'x 299, 301 (5th Cir. 2014)	Denied
Williams, Clifton Lamar	5th	*Williams v. Stephens*, 761 F.3d 561, 565 (5th Cir. 2014)	Denied
Williams, Perry Eugene	5th	*Williams v. Stephens*, 575 F.App'x 380, 382 (5th Cir. 2014)	Granted, District
Wilson, Marvin Lee	5th	*Wilson v. Thaler*, 450 F.App'x 369, 371 (5th Cir. 2011)	Granted, District
Wood, Jeffrey Lee	5th	*Wood v. Stephens*, 619 F.App'x 304, 305 (5th Cir. 2015)	Granted, Circuit
Woodard, Robert Lee	5th	*Woodard v. Thaler*, 414 F.App'x 675, 676 (5th Cir. 2011)	Denied
Young, Clinton Lee	5th	*Young v. Stephens*, 795 F.3d 484, 490 (5th Cir. 2015), as revised (July 30, 2015)	Denied

Yowell, Michael John	5th	*Yowell v. Thaler*, 545 F.App'x 311, 313 (5th Cir. 2013)	Denied
		Total Granted:	**53 (41.1%)**
		Total Denied:	**76 (58.9%)**

Eleventh Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Adkins, Ricky D.	11th	*Adkins v. Warden*, Holman CF, 710 F.3d 1241, 1243-44 (11th Cir. 2013)	Granted, Circuit
Anderson, Fred	11th	*Anderson v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 881, 902 (11th Cir. 2014)	Granted, Circuit
Arthur, Thomas D.	11th	*Arthur v. Thomas*, 739 F.3d 611, 627 (11th Cir.)	Granted, Circuit
Banks, Chadwick	11th	*Banks v. Sec'y, Fla. Dep't of Corr.*, 491 F.App'x 966, 969 (11th Cir. 2012)	Granted, District
Barwick, Darryl Brian	11th	*Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d 1239, 1243 (11th Cir. 2015)	Granted, Circuit

Bates, Kayle Barrington	11th	*Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d 1278, 1283 (11th Cir. 2014)	Granted, Circuit
Belcher, James	11th	*Belcher v. Sec'y, Dep't of Corr.*, 427 F.App'x 692, 692 (11th Cir. 2011)	Granted, Circuit
Bell, Michael	11th	*Bell v. Fla. Atty. Gen.*, 461 F.App'x 843, 845 (11th Cir. 2012)	Granted, District
Bishop, Joshua Daniel	11th	*Bishop v. Warden, GDCP*, 726 F.3d 1243, 1253 (11th Cir. 2013)	Granted, Circuit
Blanco, Omar	11th	*Blanco v. Sec'y, Fla. Dep't of Corr.*, 688 F.3d 1211, 1226 (11th Cir. 2012)	Granted, District
Bolin, Oscar Ray	11th	*In re Bolin*, No. 15-15710-P, 2016 WL 51227, at *7 fn. 4 (11th Cir. Jan. 4, 2016)	Granted, District
Booker, Stephen	11th	*Booker v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1121, 1122 (11th Cir. 2012)	Granted, Circuit
Borden, Jeffrey Lynn	11th	*Borden v. Allen*, 646 F.3d 785, 807 (11th Cir. 2011)	Granted, District

Boyd, Anthony	11th	*Boyd v. Comm'r, Ala. Dep't of Corr.*, 697 F.3d 1320, 1330 (11th Cir. 2012)	Granted, Circuit
Brannan, Andrew H.	11th	*Brannan v. GDCP Warden*, 541 F.App'x 901, 902 (11th Cir. 2013)	Granted, Circuit
Brooks, Christopher Eugene	11th	*Brooks v. Comm'r, Ala. Dep't of Corr.*, 719 F.3d 1292, 1299 (11th Cir. 2013)	Granted, Circuit
Burgess, Raymond	11th	*Burgess v. Terry*, 478 F.App'x 597, 601 (11th Cir. 2012)	Granted, Circuit
Burns, Daniel	11th	*Burns v. Sec'y, Fla. Dep't of Corr.*, 720 F.3d 1296, 1302 (11th Cir. 2013)	Granted, Circuit
Carrillo, Raul	11th	*Carrillo v. Sec'y, Fla. Dep't of Corr.*, 477 F.App'x 546, 548 (11th Cir. 2012)	Granted, District
Chavez, Juan Carlos	11th	*Chavez v. Sec'y Fla. Dep't of Corr.*, 647 F.3d 1057, 1060 (11th Cir. 2011)	Granted, District
Conner, John Wayne	11th	*Conner v. GDCP Warden*, 784 F.3d 752, 756 (11th Cir. 2015)	Granted, Circuit

Conner, John Wayne	11th	*Conner v. Hall*, 645 F.3d 1277, 1286 (11th Cir. 2011)	Granted, Circuit
Connor, Seburt Nelson	11th	*Connor v. Sec'y, Fla. Dep't of Corr.*, 713 F.3d 609, 611 (11th Cir. 2013)	Granted, Circuit
Consalvo, Robert	11th	*Consalvo v. Sec'y for Dep't of Corr.*, 664 F.3d 842, 843 (11th Cir. 2011)	Granted, District
Cook, Andrew Allen	11th	*Cook v. Warden, Ga. Diagnostic Prison*, 677 F.3d 1133, 1136 (11th Cir. 2012)	Granted, District
Cooper, Richard	11th	*Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1330-31 (11th Cir. 2011)	Granted, District
Cox, Allen W.	11th	*Cox v. McNeil*, 638 F.3d 1356, 1360 (11th Cir. 2011)	Granted, Circuit
Damren, Floyd	11th	*Damren v. Florida*, 776 F.3d 816, 820 (11th Cir. 2015)	Granted, District
Downs, Ernest Charles	11th	*Downs v. Sec'y, Fla. Dep't of Corr.*, 738 F.3d 240, 256 (11th Cir. 2013)	Granted, Circuit

Evans, Paul H.	11th	*Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1255 (11th Cir. 2012)	Granted, Circuit[2]
Evans, Wydell	11th	*Evans v. Sec'y, Fla. Dep't of Corr.*, 681 F.3d 1241, 1251 (11th Cir.)	Granted, District
Everett, Paul Glen	11th	*Everett v. Sec'y, Fla. Dep't of Corr.*, 779 F.3d 1212, 1218 (11th Cir. 2015)	Granted, Circuit
Farina, Anthony Joseph	11th	*Farina v. Sec'y, Fla. Dep't of Corr.*, 536 F.App'x 966, 970 (11th Cir. 2013)	Granted, Circuit
Ferguson, John	11th	*Ferguson v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 1315, 1330 (11th Cir. 2013)	Granted, District

2. The district court granted Mr. Evans habeas relief from his death sentence. The State appealed this ruling and the district court granted Mr. Evans a COA on two of his claims. The Court of Appeals expanded Mr. Evan's COA. Because petitioner's sentencing relief was not final when his COA was granted, we counted Mr. Evans as being under a death sentence and thus meeting the criteria for inclusion.

Ferrell, Eric Lynn	11th	*Ferrell v. Hall*, 640 F.3d 1199, 1222-23 (11th Cir. 2011)	Granted, Circuit
Floyd, Maurice Lamar	11th	*Floyd v. Sec'y, Fla. Dep't of Corr.*, No. 13-13566, 2016 WL 231484, at *1 (11th Cir. Jan. 20, 2016)	Granted, Circuit
Fults, Kenneth Earl	11th	*Fults v. GDCP Warden*, 764 F.3d 1311, 1312 (11th Cir. 2014)	Granted, Circuit
Gissendaner, Kelly Renee	11th	*Gissendaner v. Seaboldt*, 735 F.3d 1311, 1316 (11th Cir. 2013)	Granted, District
Gore, Marshall Lee	11th	*Gore v. Crews*, 720 F.3d 811, 814 (11th Cir. 2013)	Granted, District
Gonzalez, Ricardo	11th	*Gonzalez v. Sec'y, Fla. Dep't of Corr.*, 629 F.3d 1219, 1220 (11th Cir. 2011)	Granted, District
Greene, Daniel	11th	*Greene v. Upton*, 644 F.3d 1145, 1153 (11th Cir. 2011)	Granted, Circuit
Griffin, Michael Allen	11th	*Griffin v. Sec'y, Fla. Dep't of Corr.*, 787 F.3d 1086, 1087 (11th Cir. 2015)	Denied

Grim, Norman Mearle	11th	*Grim v. Sec'y, Fla. Dep't of Corr.*, 705 F.3d 1284, 1286 (11th Cir. 2013)	Denied
Gudinas, Thomas Lee	11th	*Gudinas v. Sec'y, Dep't of Corr.*, 436 F.App'x 895, 896 (11th Cir. 2011)	Granted, Circuit
Hardy, John Milton	11th	*Hardy v. Comm'r, Ala. Dep't of Corr.*, 684 F.3d 1066, 1073 (11th Cir. 2012)	Granted, District
Harvey, Harold Lee	11th	*Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1237 (11th Cir. 2011)	Granted, District
Heath, Ronald Palmer	11th	*Heath v. Sec'y, Fla. Dep't of Corr.*, 717 F.3d 1202, 1204 (11th Cir. 2013)	Granted, District
Henry, George Russell	11th	*Henry v. Warden, Ga. Diagnostic Prison*, 750 F.3d 1226, 1230 (11th Cir. 2014)	Granted, District
Hitchcock, James	11th	*Hitchcock v. Sec'y, Fla. Dep't of Corr.*, 745 F.3d 476, 480 (11th Cir. 2014)	Granted, Circuit

Hittson, Travis Clinton	11th	*Hittson v. GDCP Warden*, 759 F.3d 1210, 1217 (11th Cir. 2014)	Granted, Circuit
Holland, Albert Jr.	11th	*Holland v. Florida*, 775 F.3d 1294, 1305 (11th Cir. 2014)	Granted, Circuit
Holsey, Robert Wayne	11th	*Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1231 (11th Cir. 2012)	Granted, District
Howell, Paul A.	11th	*Howell v. Sec'y, Fla. Dep't of Corr.*, 730 F.3d 1257, 1260 (11th Cir. 2013)	Granted, District
Hunt, Gregory	11th	*Hunt v. Comm'r, Ala. Dep't of Corr.*, 666 F.3d 708, 720 (11th Cir. 2012)	Granted, District
Israel, Connie Ray	11th	*Israel v. Sec'y, Fla. Dep't of Corr.*, 517 F.App'x 694, 695 (11th Cir. 2013)	Granted, District
Johnson, Marcus Ray	11th	*Johnson v. Warden, Ga. Diagnostic & Classification Prison*, 805 F.3d 1317, 1323 (11th Cir. 2015)	Denied

Johnson, Marcus Ray	11th	*Johnson v. Warden*, 808 F.3d 1275, 1283 (11th Cir. 2015)	Denied
Johnson, Terrell M.	11th	*Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907, 911 (11th Cir. 2011)	Granted, Circuit
Jones, Brandon Astor	11th	*Jones v. GDCP Warden*, 753 F.3d 1171, 1181 (11th Cir. 2014)	Granted, District
Jones, Randall Scott	11th	*Jones v. Sec'y, Dep't of Corr.*, 644 F.3d 1206, 1208 (11th Cir. 2011)	Granted, Circuit
Kilgore, Dean	11th	*Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1308-09 (11th Cir. 2015)	Granted, Circuit
Kuenzel, William Earnest	11th	*Kuenzel v. Comm'r, Ala. Dep't of Corr.*, 690 F.3d 1311, 1314 (11th Cir. 2012)	Granted, District
Lambrix, Cary Michael	11th	*Lambrix v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1246, 1258 (11th Cir.)	Denied
Lawrence, Jonathan Huey	11th	*Lawrence v. Sec'y, Fla. Dep't of Corr.*, 700 F.3d 464, 476 (11th Cir. 2012)	Granted, Circuit

Lee, Jeffrey	11th	*Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1191 (11th Cir. 2013)	Granted, District
Lucas, Harold Gene	11th	*Lucas v. Sec'y, Dep't of Corr.*, 682 F.3d 1342, 1351 (11th Cir. 2012)	Granted, District
Lucas, Daniel Anthony	11th	*Lucas v. Warden, Ga. Diagnostic & Classification Prison*, 771 F.3d 785, 790 (11th Cir. 2014)	Granted, Circuit
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Madison, Vernon	11th	*Madison v. Comm'r, Ala. Dep't of Corr.*, 677 F.3d 1333, 1335 (11th Cir. 2012)	Granted, Circuit
Madison, Vernon	11th	*Madison v. Comm'r, Ala. Dep't of Corr.*, 761 F.3d 1240, 1241 (11th Cir. 2014)	Granted, Circuit

McNabb, Torrey Twane	11th	*McNabb v. Comm'r, Ala. Dep't of Corr.*, 727 F.3d 1334, 1335 (11th Cir. 2013)	Granted, District
McWilliams, James E.	11th	*McWilliams v. Comm'r, Ala. Dep't of Corr.*, No. 13-13906, 2015 WL 8950641, at *1 (11th Cir. Dec. 16, 2015)	Granted, Circuit
Melton, Antonio Lebaron	11th	*Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 1235 (11th Cir.)	Denied
Mendoza, Marbel	11th	*Mendoza v. Sec'y, Fla. Dep't of Corr.*, 761 F.3d 1213, 1215 (11th Cir. 2014)	Granted, Circuit
Morris, Robert	11th	*Morris v. Sec'y, Dep't of Corr.*, 677 F.3d 1117, 1125 (11th Cir. 2012)	Granted, Circuit
Morton, Alvin Leroy	11th	*Morton v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1157, 1165 (11th Cir. 2012)	Granted, Circuit
Myers, Robin D.	11th	*Myers v. Allen*, 420 F.App'x 924, 927 (11th Cir. 2011)	Granted, District

Owen, Donald Eugene	11th	*Owen v. Fla. Dep't of Corr.*, 686 F.3d 1181, 1191-92 (11th Cir. 2012)	Granted, District
Pietri, Norberto	11th	*Pietri v. Fla. Dep't of Corr.*, 641 F.3d 1276, 1279 (11th Cir. 2011)	Granted, District
Ponticelli, Anthony John	11th	*Ponticelli v. Sec'y, Fla. Dep't of Corr.*, 690 F.3d 1271, 1291 (11th Cir. 2012)	Granted, District
Pooler, Leroy	11th	*Pooler v. Sec'y, Fla. Dep't of Corr.*, 702 F.3d 1252, 1268 (11th Cir. 2012)	Granted, District
Preston, Robert Anthony	11th	*Preston v. Sec'y, Fla. Dep't of Corr.*, 785 F.3d 449, 451 (11th Cir. 2015)	Granted, Circuit
Price, Christopher Lee	11th	*Price v. Allen*, 679 F.3d 1315, 1319 (11th Cir. 2012)	Granted, Circuit
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Ray, Domenique	11th	*Ray v. Ala. Dep't of Corr.*, No. 13-15673, 2016 WL 66534, at *3 (11th Cir. Jan. 6, 2016)	Granted, Circuit

Reese, John Loveman	11th	*Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1286 (11th Cir. 2012)	Granted, District
Roberts, David Lee	11th	*Roberts v. Comm'r, Ala. Dep't of Corr.*, 677 F.3d 1086, 1088 (11th Cir. 2012)	Granted, Circuit
Rodriguez, Manuel Antonio	11th	*Rodriguez v. Sec'y, Fla. Dep't of Corr.*, 756 F.3d 1277, 1280 fn. 5 (11th Cir. 2014)	Granted, District
Rose, Milo A.	11th	*Rose v. McNeil*, 634 F.3d 1224, 1240 (11th Cir. 2011)	Granted, Circuit
Rozzelle, Roger Allen	11th	*Rozzelle v. Sec'y, Fla. Dep't of Corr.*, 672 F.3d 1000, 1009 (11th Cir. 2012)	Granted, District
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San Martin, Pablo	11th	*San Martin v. McNeil*, 633 F.3d 1257, 1265 (11th Cir. 2011)	Granted, District

Smith, Joseph Clifton	11th	*Smith v. Campbell*, 620 F.App'x 734, 745 (11th Cir. 2015)	Granted, Circuit
Smith, Ronald Bert	11th	*Smith v. Comm'r, Ala. Dep't of Corr.*, 703 F.3d 1266, 1268 fn. 1 (11th Cir. 2012)	Granted, Circuit
Smithers, Samuel	11th	*Smithers v. Sec'y, Fla. Dep't of Corr.*, 501 F.App'x 906, 907 (11th Cir. 2012)	Granted, Circuit
Stewart, Kenneth A.	11th	*Stewart v. Sec'y, Fla. Dep't of Corr.*, No. 14-11238, 2015 WL 9301490, at *3 (11th Cir. Dec. 22, 2015)	Granted, Circuit
Tanzi, Michael Anthony	11th	*Tanzi v. Sec'y, Fla. Dep't of Corr.*, 772 F.3d 644, 650 (11th Cir. 2014)	Granted, Circuit
Taylor, Michael Shannon	11th	*Taylor v. Culliver*, No. 13-11179, 2015 WL 4645228, at *1 (11th Cir. Aug. 6, 2015)	Granted, Circuit
Taylor, Perry Alexander	11th	*Taylor v. Sec'y, Fla. Dep't of Corr.*, 760 F.3d 1284, 1293 (11th Cir. 2014)	Granted, Circuit
Terrell, Brian Keith	11th	*Terrell v. GDCP Warden*, 744 F.3d 1255, 1258 (11th Cir.)	Granted, Circuit

Trepal, George James	11th	*Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1107 (11th Cir. 2012)	Granted, District
Troy, John	11th	*Troy v. Sec'y, Fla. Dep't of Corr.*, 763 F.3d 1305, 1312 (11th Cir. 2014)	Granted, Circuit
Waldrip, Tommy Lee	11th	*Waldrip v. Humphrey*, 532 F.App'x 878, 879 (11th Cir. 2013)	Granted, Circuit
Walls, Frank A.	11th	*Walls v. Buss*, 658 F.3d 1274, 1277 (11th Cir. 2011)	Granted, District
Wellons, Marcus A.	11th	*Wellons v. Warden, Ga. Diagnostic & Classification Prison*, 695 F.3d 1202, 1206 (11th Cir. 2012)	Granted, Circuit
White, Leroy	11th	*White v. Jones*, 408 F.App'x 292, 293 (11th Cir. 2011)	Denied
Williamson, Dana	11th	*Williamson v. Fla. Dep't of Corr.*, 805 F.3d 1009, 1015 (11th Cir. 2015)	Granted, District
Wilson, Marion Jr.	11th	*Wilson v. Warden, Ga. Diagnostic Prison*, 774 F.3d 671, 677 (11th Cir. 2014)	Granted, District

Wright, Joel Dale	11th	*Wright v. Sec'y, Fla. Dep't of Corr.*, 761 F.3d 1256, 1260 (11th Cir. 2014)	Granted, District
Zack, Michael Duane	11th	*Zack v. Tucker*, 666 F.3d 1265, 1267 (11th Cir. 2012)	Granted, District
		Total Granted:	**104 (93.7%)**
		Total Denied:	**7 (6.3%)**

SUPREME COURT, U.S.
FILED
AUG 29 2016
OFFICE OF THE CLERK

No. 15-8049

In the Supreme Court of the United States

DUANE EDWARD BUCK, PETITIONER

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Petitioner shot his stepsister at point-blank range, shot another man through the heart, executed his former girlfriend in the street outside her home while her children watched, and laughed about what he had done. A Texas jury sentenced petitioner to death, finding that he would be a future danger to society. At the penalty phase, petitioner's defense counsel relied on his own expert's report and testimony that linked petitioner's race to future dangerousness. Petitioner's expert nevertheless concluded, against the substantial weight of other evidence presented to the jury, that petitioner presented a low likelihood of future dangerousness. After procedurally defaulting his claim of ineffective assistance of trial counsel, petitioner eventually sought to raise that claim through his second Federal Rule of Civil Procedure 60(b)(6) motion to reopen the judgment denying his federal habeas petition. The motion was based on the State waiving any opposition to resentencing in other cases in which the same expert testified but the *prosecution* elicited the race-as-dangerousness testimony.

The question presented is whether, in light of the overwhelming aggravating evidence and the minimal nature of the challenged expert evidence in this unique case, the court of appeals erred in concluding that petitioner was not entitled to a certificate of appealability ("COA") because he did not make a substantial showing that the district court abused its discretion in finding that petitioner failed to establish extraordinary circumstances under Rule 60(b)(6) sufficient to reopen a final judgment denying habeas relief to permit him to relitigate a defaulted and meritless ineffective-assistance claim.

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INTRODUCTION

Respondent agrees that "[r]ace is an arbitrary, emotionally charged factor that has nothing to do with individual moral culpability." Pet. Br. 28. Respondent further agrees that the introduction of race into petitioner's capital-punishment proceedings by petitioner's own trial counsel was at least debatably deficient performance, allowing petitioner to establish one element of his application for a COA on his Sixth Amendment claim of ineffective assistance of trial counsel.

But that was not the only showing required to obtain a COA. Petitioner could not obtain a COA without also making a "substantial showing," 28 U.S.C. § 2253(c)(2), on the other half of his ineffective-assistance claim: the prejudice element, requiring a substantial likelihood that the outcome of the capital-punishment proceedings would have been different if petitioner's trial counsel had not presented the expert evidence at issue.

Additionally, petitioner had to show that reasonable jurists would debate whether the district court abused its discretion in finding that petitioner's second Rule 60(b)(6) motion presented no extraordinary circumstances warranting reopening the final judgment denying his habeas petition.

As explained below, petitioner failed to surmount these significant obstacles to obtaining a COA.

STATEMENT

A. Factual Background

1. In July 1995, Kenneth Butler, his brother Harold Ebnezer, family friend Debra Gardner, and Gardner's friend Phyllis Taylor went to Gardner's home in southwest Houston after a night out shooting pool. J.A. 42a, 51a, 75a-76a. At least four children—Taylor's infant, Gardner's adolescent son Devon, Devon's older sister

Shennel, and Devon's cousin Kanetta—were already in the house when the four adults arrived. J.A. 51a-52a, 93a-96a, 109a-111a.

Around 2:30 a.m., when the adults were laughing and joking in the living room, Taylor's stepbrother, petitioner Duane Buck, banged loudly on the front door. J.A. 51a-52a; R.6365-66.[1] Up until two or three weeks earlier, petitioner had been in an unstable romantic relationship with Gardner, and he apparently believed that Butler had been sleeping with Gardner. J.A. 73a-75a, 99a. When Gardner heard that it was petitioner at the door, she called 911 and told the others to go to the back of the house. J.A. 52a-53a.

Petitioner kicked in the front door and entered the house, swearing and yelling. J.A. 53a-55a, 77a. When he approached Gardner and started hitting her, Ebnezer got between them and kept petitioner an arm's length away. J.A. 55a-56a. Petitioner eventually calmed down and told Gardner that he had come to retrieve clothes that he had left at Gardner's house. J.A. 57a-59a, 78a. Gardner gave petitioner his clothes, and he left. J.A. 57a-58a, 77a-78a.

About 45 minutes later, after petitioner had driven back to his father and stepmother's house in northeast Houston, petitioner called the Gardner home and spoke with Taylor. J.A. 78a-79a; R.5716, 5718-19, 5972, 6436-38. Petitioner asked to talk to Gardner. J.A. 79a. When Gardner declined, petitioner hung up. J.A. 79a. Taylor, Gardner, Ebnezer, and Butler talked about what had happened that morning, then went to sleep around 4:30 or 5:00 a.m. in different parts of Gardner's house. J.A. 58a-59a, 80a.

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[1] "R." refers to the record on appeal in the Fifth Circuit.

Back in northeast Houston, petitioner took a shotgun and a rifle from his stepmother's room. R.5714, 6437. Petitioner's teenage brother Clarence watched petitioner load the guns and told petitioner to stop pointing one of them at him. R.6436-38. Petitioner took both guns with him when he set out on the 28-mile drive back to Gardner's house. R.2101, 5716, 5718-19, 5972-74, 6437-38.

2. Around 7:00 a.m., petitioner again banged on Gardner's front door and then kicked it in. J.A. 59a-61a, 80a-81a; R.5859. This time, he had the shotgun and rifle from his stepmother's room with him. J.A. 61a-62a; *see* R.5862-63.

Petitioner fired the shotgun at Ebnezer but missed. J.A. 61a-62a. He then put the shotgun down, armed himself with the rifle, and approached his stepsister Taylor, who was sitting on a couch. J.A. 81a-82a. Petitioner told her: "I'm going to shoot your ass too." J.A. 82a. Taylor responded: "Duane, please don't shoot me. I'm your sister. I don't deserve to be shot. Remember I do have children." J.A. 83a. Petitioner put the gun to Taylor's chest and shot her. Although the bullet did not kill her, it missed her heart by only an inch. J.A. 83a-84a, 90a-91a.

By that time, Ebnezer had run to the back of the house, passing Butler in a hallway and warning him that petitioner had a gun. J.A. 63a-64a. Ebnezer ran into the back yard and found Gardner there, too. J.A. 64a.

Meanwhile, petitioner had moved to the back of the house and shot Butler at close range. J.A. 101a. Petitioner left Butler bleeding in the hallway. J.A. 101a.

Despite having suffered a point-blank shot to her chest, Taylor managed to get up and check on Gardner's son Devon and his cousin Kanetta, who were hid-

ing in a bedroom closet. J.A. 84a-85a, 98a. Taylor shut the closet door, went to the telephone, and called 911. J.A. 85a. But when she heard petitioner's voice, she hung up and got into the closet. R.5867.

In the hallway of Gardner's house, Butler "was throwing up a lot of blood" and trying to talk after petitioner had shot him. J.A. 101a-102a. Devon and Shennel went to Butler and tried to help him. J.A. 101a. Shennel thought that petitioner had shot Butler in the mouth because all she saw was blood coming out of his mouth. J.A. 113a. In fact, petitioner had shot Butler through the heart and a lung. J.A. 120a.

Devon and Shennel went outside to the sidewalk in front of their house. R.6396-97. Devon saw petitioner chasing Ebnezer down the sidewalk. R.6397. Ebnezer ran to a neighbor's house and asked the person who answered the door to call 911. J.A. 67a.

Gardner by then had run out into the street. J.A. 65a. She pleaded with the driver of a passing car to let her in, but the car drove off. J.A. 65a-66a, 103a-104a.

Petitioner approached Gardner in the street from behind. J.A. 66a-67a; R.6398. Devon watched from the sidewalk as his mother stopped in the middle of the street, turned to petitioner, and said: "Please don't shoot me. Please don't shoot me. Why are you doing this in front of my kids?" J.A. 104a; R.6428, 6398-99. Shennel also begged petitioner not to shoot her mother and even jumped on petitioner's back to try to stop him. J.A. 114a, 116a. But petitioner kept the gun pointed directly at Gardner, repeating: "I'm going to shoot you. I'm going to shoot your A[ss]." J.A. 117a.

Petitioner then shot Gardner, perforating her right lung, diaphragm, and liver. J.A. 122a. The bullet's path

was consistent with Gardner being on her knees when she was shot. J.A. 122a.

Petitioner walked back toward the house, retrieved the shotgun that he had left by the front door, and put both the shotgun and rifle into the trunk of his stepmother's car. R.6399. Petitioner then walked back over to Gardner and said: "It ain't funny now. You ain't laughing now." J.A. 106a.

Petitioner walked away from the crime scene after unsuccessfully trying to start his stepmother's car. J.A. 106a-108a. According to Devon, petitioner "was acting like he ain't done nothing." J.A. 108a.

3. Deputy D.R. Warren arrived at the scene and stayed with Gardner, who was lying in a puddle of blood and struggling to breathe. J.A. 130a-131a. Deputy Warren saw three young children near Gardner, including "a little girl who was three or four" and "was running around and crying[,] trying to come over" to where Gardner was lying in the street. J.A. 131a. Gardner told the girl she loved her, and the girl gave Gardner a hug. J.A. 132a.

A second responding officer, Deputy Paul McGinty, noticed a man walking away from where Gardner was lying in the street. J.A. 42a-43a.

McGinty asked a police dispatcher to send paramedics and Life Flight. J.A. 43a-44a. Gardner was at that point "still moving," but she was having difficulty breathing and "not saying anything that [McGinty] could understand other than showing that she was in a good deal of pain." J.A. 44a.

While Deputy McGinty was assisting Gardner, he heard a man yelling "He shot her" and chasing another man towards Deputy McGinty. J.A. 45a-46a. That man was petitioner, whom Deputy McGinty recognized as

the man walking away from the shooting. J.A. 46a. Deputy McGinty took petitioner into custody, placing him in the back of a patrol car. J.A. 46a.

When Deputy McGinty went into the house, he found Butler lying face down in the hallway. J.A. 48a. He also encountered several children who were screaming and crying. J.A. 48a-49a. He took them to a neighbor's house. J.A. 49a.

In the patrol car, petitioner was "laughing and taunting and joking." J.A. 71a; *see* J.A. 89a, 133a-134a. Shennel saw petitioner "in the police car laughing"; petitioner "thought it was funny and it wasn't." J.A. 118a.

On the way to the police station, petitioner continued to smile and laugh. J.A. 134a. When Deputy Warren told petitioner that he did not think the situation was very funny, petitioner stated: "The bitch got what she deserved." J.A. 135a. Petitioner added that God had already forgiven him. J.A. 135a. He remained happy and upbeat as he was taken to the police station. J.A. 135a-136a.

By that time, Butler was dead in the hallway. J.A. 48a. Gardner was dead in the street. J.A. 132a. And Taylor, who survived her stepbrother's point-blank attack, was en route to surgery via Life Flight. J.A. 90a.

B. Judicial Proceedings

1. a. Petitioner was convicted of capital murder. J.A. 276a. At the penalty phase of trial, several lay and expert witnesses testified for the State and for petitioner.

Petitioner's former girlfriend Vivian Jackson testified that petitioner had abused her. J.A. 125a-127a. Jackson explained that, by the end of their relationship, petitioner had begun to hit her almost every day. J.A. 127a. Before then, he had also held a gun to her throat and, in a separate incident, to her face. J.A. 127a. He

had beaten her with a belt, a coat hanger, and a cast on his arm. J.A. 127a. He had threatened to pour boiling water on her. J.A. 127a. Jackson stated that she had been too afraid to call the police about these incidents. J.A. 128a.

The State's other penalty-phase witnesses were Harris County Sheriff's Deputy R.L. Schield, Deputy Warren, and Deputy McGinty. R.933, 977, 987, 991. They testified about petitioner's previous convictions, his upbeat demeanor after the attack, and Gardner's dying moments surrounded by her children. R.955-56 (testimony regarding State's exhibits 62, 63, 67, and 68), 979-81, 992-1001.

Petitioner called several lay witnesses who testified about his behavior before his shooting spree. R.5961-85. He also called two clinical psychologists to help the jury determine "whether there is a probability that [petitioner] would commit criminal acts of violence that would constitute a continuing threat to society." Act of May 17, 1991, 72d Leg., R.S., ch. 838, § 1, art. 37.071(b)(1), 1991 Tex. Gen. Laws 2898, 2899 ("Former Article 37.071") (current version at Tex. Code Crim. Proc. art. 37.071, § 2(b)(1)); *see* J.A. 138a, 145a. This inquiry is often referred to as the "future dangerousness" issue in capital-punishment proceedings in Texas. *See* J.A. 146a.

One of the psychologists petitioner called was Dr. Patrick Lawrence. R.6068. Lawrence had evaluated hundreds of offenders and had testified for both the prosecution and defense; here, he opined that petitioner was not likely to present future dangerousness. R.6071, 6077, 6094-96.

The other psychologist petitioner called was Dr. Walter Quijano. J.A. 138a. During petitioner's direct

examination of Quijano, defense counsel moved to admit into evidence a copy of the report that Quijano prepared for petitioner's case. J.A. 152a. Over the State's objection, the trial court ruled that it would admit a redacted version of Quijano's report. J.A. 14a-23a, 151a-153a; R.6003-04, 6007-32; *see* R.6127.

Quijano's report first indicated that several "statistical factors," including a capital defendant's past crimes, age, and sex, are predictive of future dangerousness. J.A. 18a (capitalization altered). Quijano's report went on to identify race as another relevant factor for assessing future dangerousness, as follows: "Black: Increased probability. There is an over-representation of Blacks among the violent offenders." J.A. 19a. Petitioner is African-American. J.A. 235a.

Petitioner's counsel elicited Quijano's testimony regarding these factors on direct examination. J.A. 146a. When petitioner's counsel asked about the report's race factor, Quijano stated: "It's a sad commentary that minorities, Hispanics and black people, are over represented in the Criminal Justice System." J.A. 146a. After discussing other purportedly relevant statistical and environmental factors, Quijano testified that petitioner was unlikely to commit criminal acts of violence that would constitute a continuing threat to society. J.A. 146a-150a. Quijano did, however, agree that there was "a probability that [petitioner] would be a continuing threat to society." J.A. 176a. Quijano explained his view that petitioner "would be on the low end of the continuum," adding that he "never rule[s] out any probability." J.A. 176a; *see also* R.6105-06 (admission by Lawrence that there were "no guarantees" that petitioner "will never commit other violent acts").

The prosecutor then cross-examined Quijano at length. She questioned him about his interview and testing of petitioner, his review of eyewitness statements, and several portions of his report. J.A. 155a-176a. During a colloquy reviewing Quijano's report—which the trial court had told counsel would be admitted on petitioner's motion, over the State's objection—the prosecutor asked: "You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?" J.A. 170a. Consistent with his report, Quijano answered: "Yes." J.A. 170a.

This was the prosecutor's only question on that matter. It appears in the transcript amid several other exchanges canvassing Quijano's report, including ones in which Quijano admitted that numerous factors—including petitioner's history of abuse towards women; his unstable employment record; the extreme violence of his attack on Ebnezer, Taylor, Butler, and Gardner; and the availability of drugs, alcohol, and weapons in prison—increased the probability of future dangerousness. J.A. 168a-175a.

In a further exchange, the prosecutor asked Quijano:

> If you had information that the person thought it was quite humorous, the crime that he committed, which was an extremely violent and heinous act, and even after seeing the result of his handiwork with people bleeding, people screaming, children crying, children running over to their mother and hugging her before she died, would that indicate to you that that person with no re-

morse would have a greater probability of being a danger in the future?

J.A. 175a-176a. Quijano responded: "Yes." J.A. 176a.

b. In closing argument, petitioner's counsel argued that the State had not met its burden to prove that petitioner should be sentenced to death. J.A. 187a-196a. Petitioner's counsel made one brief reference to Quijano, noting Quijano's opinion that petitioner was unlikely to commit an act of violence in prison and arguing that the State had not discredited Quijano. J.A. 192a-193a.

The prosecutor argued that the evidence supported a finding of future dangerousness and, with respect to Quijano, reminded the jurors that they had "heard from Dr. Quijano, who had a lot of experience in the Texas Department of Corrections, who told you that there was a probability that [petitioner] would commit future acts of violence." J.A. 197a-199a. This was the only mention of Quijano in the prosecutor's closing statement, and the prosecutor did not remind the jury about Quijano's reference to race.

c. The jury deliberated and returned answers to the penalty-phase questions. *See Ex parte Buck*, 418 S.W.3d 98, 98 (Tex. Crim. App. 2013) (per curiam). In accordance with those answers, the trial court sentenced petitioner to death. *See id.* The Texas Court of Criminal Appeals affirmed petitioner's conviction and sentence on direct appeal. *See id.*

2. a. Petitioner's initial state-court application for a writ of habeas corpus did not complain about Quijano's testimony or raise a claim of ineffective assistance of trial counsel. *See* J.A. 277a. While that first application was pending, the State confessed error in *Saldano v. Texas*, 530 U.S. 1212 (2000), a case in which the *prosecution* used Quijano as an expert witness and elicited

race-related testimony from him regarding the defendant's future dangerousness. *See* J.A. 295a-307a.[2] Petitioner subsequently filed a second state-court habeas application in which he challenged Quijano's testimony and asserted ineffective assistance of trial counsel. *See* J.A. 278a. The Texas Court of Criminal Appeals denied petitioner's first application and dismissed the second as an abuse of the writ. *See* J.A. 278a.

b. One year later, petitioner filed a federal habeas petition. *See* J.A. 223a. The petition included a claim that Quijano's reliance on race and the prosecutor's description of Quijano's race-related testimony violated petitioner's Sixth and Fourteenth Amendment rights to an impartial jury, due process, and equal protection. *See* J.A. 235a-236a. It also included a claim of ineffective assistance of trial counsel based on Quijano's testimony. *See* J.A. 236a. The district court denied the petition, finding each of the claims procedurally defaulted and further concluding that petitioner had failed to establish the cause and prejudice he would have needed to excuse the default. J.A. 236a-238a. The district court entered

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[2] On remand from this Court, the Texas Court of Criminal Appeals declined to accept the State's confession of error and reinstated Saldano's sentence. *Saldano v. State*, 70 S.W.3d 873, 891 (Tex. Crim. App. 2002). Saldano subsequently filed a federal habeas corpus petition, which the district court granted because "constitutional error occurred in th[e] case, and because the court decide[d] in its discretion to honor the [State]'s waiver of the affirmative defenses of procedural default and harmless error." *Saldano v. Cockrell*, 267 F Supp. 2d 635, 645 (E.D. Tex. 2003). The Fifth Circuit affirmed the district court's related denial of the district attorney's motion to intervene to argue in support of Saldano's sentence, and it dismissed the district attorney's appeal of the judgment granting habeas relief. *Saldano v. Roach*, 363 F.3d 545, 556 (5th Cir. 2004).

final judgment granting respondent's motion for summary judgment and dismissing petitioner's case with prejudice. R.235. It also declined to issue a COA. J.A. 247a; R.235; *see* 28 U.S.C. § 2253(c)(1).

The court of appeals reached the same conclusions as to procedural default and added that, if it were to consider the merits, it would not issue a COA because petitioner failed to make a substantial showing of the deprivation of a constitutional right. *Buck v. Thaler*, 345 F. App'x 923 (5th Cir. 2009) (per curiam). This Court denied petitioner's request for a writ of certiorari, and the judgment became final. *Buck v. Thaler*, 130 S. Ct. 2096 (2010) (mem.).

c. Petitioner then moved in district court for relief from the final judgment denying his federal habeas petition, claiming that the State's failure to confess error and waive procedural defenses to petitioner's constitutional claims were extraordinary circumstances justifying relief from the judgment under Rule 60(b)(6) and fraud on the court under Rule 60(d)(3). R.273-90. Petitioner's theory was that the Texas Attorney General had publicly promised not to object to resentencing in his case and five others involving Quijano's testimony that had been referenced in press statements. R.273-90. As the court of appeals noted, however, the record did not reflect that the "Attorney General's statements created legally enforceable rights or later precluded him from distinguishing [petitioner]'s case from the other cases." *Buck v. Thaler*, 452 F App'x 423, 432 (5th Cir. 2011) (per curiam).

The district court denied petitioner's Rule 60 motion and a subsequent motion under Rule 59(e) in which petitioner claimed that the State had made material misrepresentations and omissions in its opposition to his

earlier Rule 60 motion. *See* J.A. 279a. The court of appeals declined to issue a COA and reiterated its earlier conclusion that petitioner's due-process and equal-protection claims would fail on the merits. *See* J.A. 278a-279a; *Buck*, 452 F. App'x at 428, 432-33.

Petitioner again unsuccessfully sought a writ of certiorari. *Buck v. Thaler*, 132 S. Ct. 32 (2011) (mem.). Justice Alito, joined by Justices Scalia and Breyer, issued a statement respecting the denial of certiorari noting the unique facts of this case and distinguishing it from others in which Quijano testified. *Id.* at 32-35 (explaining that petitioner's case was "the only case in which it can be said that the responsibility for eliciting the offensive testimony lay squarely with the defense"). Justice Sotomayor, joined by Justice Kagan, dissented, stating their view that petitioner was entitled to a COA on his constitutional claims based on Quijano's testimony. *Id.* at 35-38.

d. Petitioner then filed a third state habeas application. *See* J.A. 279a. While that application was pending before the Texas Court of Criminal Appeals, this Court held, in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), that ineffective assistance of counsel during initial state habeas proceedings in Texas could excuse procedural default of a claim that trial counsel was ineffective. *Id.* at 1921 (extending the reasoning of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012)). The Texas Court of Criminal Appeals dismissed petitioner's third habeas application as an abuse of the writ. *See* J.A. 280a. This Court again denied certiorari. *Buck v. Texas*, 134 S. Ct. 2663 (2014) (mem.).

3. a. In federal district court, petitioner then filed a second motion under Rule 60(b)(6) for relief from the final judgment denying his federal habeas petition.

R.1048-1228 (motion and exhibits). The motion focused on petitioner's ineffective-assistance claims regarding his trial counsel's elicitation of race-related evidence from Quijano. R.1067. In the instant case, petitioner wishes to appeal the denial of this motion by obtaining a COA.

The motion asserted that, instead of "s[eeking] funding to retain an expert who did not harbor . . . racially biased, and constitutionally inadmissible, views," petitioner's trial counsel

> [i]ntroduced and relied on Dr. Quijano's testimony and report; they made no effort to ameliorate the harm that inevitably flowed from Dr. Quijano's testimony; they offered no objections; they sought no limiting or curative instruction; and they made no attempt in closing argument to limit, rebut, or contextualize Dr. Quijano's testimony.

R.1067. Petitioner's motion also suggested that the final judgment should be reopened to allow him to argue, under this Court's later decision in *Trevino*, that procedural default should be excused; the motion asserted that state habeas counsel was ineffective in failing to assert that trial counsel was ineffective in both eliciting the Quijano evidence and in failing to challenge "Texas's reliance on" that evidence during the prosecutor's cross-examination of Quijano and in closing arguments. R.1063.

The district court denied the Rule 60(b)(6) motion and declined to issue a COA. J.A. 267a-268a. The court applied precedent of this Court and the Fifth Circuit to hold that a change in decisional law, such as *Trevino*'s extension of *Martinez*, does not alone constitute "extraordinary circumstances" allowing the reopening of a

final judgment. J.A. 260a. The district court reasoned that, although the conduct of petitioner's trial counsel fell below an objective standard of reasonableness, the strong aggravating evidence presented to the jury meant that petitioner could not show that he was prejudiced by his counsel's performance. J.A. 260a-265a (citing *Strickland v. Washington*, 466 U.S. 668 (1984), and concluding that "it cannot be said that there is a reasonable probability that the outcome would have been different if Quijano had made no reference to race").

Petitioner also moved for relief from the district court's judgment under Rule 59(e). *See* J.A. 270a. Noting that "[petitioner]'s argument boils down to mere disagreement with [the court's Rule 60(b)(6)] analysis," the district court denied that motion and again declined to issue a COA. *See* J.A. 272a-273a.

b. Petitioner requested a COA from the court of appeals. *See* J.A. 275a. The court of appeals declined the request, finding that "[j]urists of reason would not debate that petitioner has failed to show extraordinary circumstances justifying relief" under Rule 60(b)(6). J.A. 287a.

In describing the relevant procedural history, the court of appeals noted that, after this Court vacated the judgment in *Saldano* based on the State's confession of error, the Texas Attorney General "publicly identified eight other cases involving racial testimony by Quijano, six of which the [Attorney General] said were similar to Saldano's case; one of those was [petitioner]'s." J.A. 277a. But the court of appeals noted that "[i]t has never been established that the [State] promised not to raise procedural defenses in [petitioner]'s case." J.A. 277a-278a n.1; *see* J.A. 211a-218a (press releases); R.308-09, 1110 (news articles).

In analyzing whether petitioner was entitled to a COA, the court of appeals explained that it was required to deny the application "if [petitioner] fails to establish both (1) that jurists of reason would find debatable 'whether the petition states a valid claim of the denial of a constitutional right' and (2) that those jurists 'would find it debatable whether the district court was correct in its procedural ruling.'" J.A. 281a (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). For purposes of the second part of that analysis, the court of appeals noted that the procedural reason that the district court denied relief was "[petitioner]'s failure to show extraordinary circumstances justifying relief under Rule 60(b)(6)." J.A. 281a.

The court of appeals identified the "eleven facts . . that [petitioner] says make the case extraordinary." J.A. 283a-285a. In rejecting petitioner's argument, the court noted that five of those facts were

> just variations on the merits of [petitioner]'s [ineffective-assistance] claim, which is at least unremarkable as far as [ineffective-assistance] claims go. [Petitioner]'s [ineffective-assistance] claim is not so different in kind or degree from other disagreements over trial strategy between lawyer and client that it counts as an exceptional case. Nor are [ineffective-assistance] claims as a class extraordinary under Rule 60(b)(6).

J.A. 285a.

After noting that two of petitioner's other facts "merely point[ed] out that [petitioner]'s [ineffective-assistance] claim was procedurally defaulted and did not get a merits determination," the court of appeals concluded that "[n]o jurists of reason would expand the definition of 'extraordinary' to reach all procedurally

defaulted [ineffective-assistance] claims." J.A. 285a-286a. And the "facts" relating to *Trevino* and *Martinez*, the court of appeals explained, merely pointed to a change in decisional law that was likewise insufficient, in itself, to establish extraordinary circumstances. J.A. 286a.

Finally, the court of appeals addressed petitioner's argument about the State's purported promise not to object to resentencing in light of its confession of error in *Saldano*. J.A. 286a. On this point, the court of appeals reiterated that petitioner had failed to establish any promise by the State in his case. J.A. 286a. But even assuming the State had both made and breached such a promise, the court of appeals stated that

> [t]he broken-promise element to this case makes it odd and factually unusual, but extraordinary circumstances are not merely found on the spectrum of common circumstances to unique circumstances. And they must be extraordinary circumstances 'justifying relief from the judgment.' [Petitioner] has not shown why the alleged reneging would justify relief from the judgment. For example, he has not shown that he relied on the alleged promise to his detriment.

J.A. 286a-287a (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 537 (2005)). The court of appeals went on to explain that "[e]ven assuming arguendo that the other cases at issue are materially similar to [petitioner]'s (which the state disputes), it can hardly be extraordinary that the state chose different litigation strategies between the two cases. Jurists of reason would not debate that [petitioner] has failed to show extraordinary circumstances justifying relief." J.A. 287a.

Petitioner unsuccessfully petitioned for rehearing en banc. J.A. 289a. Judge Dennis, joined by Judge Graves, dissented, stating his view that petitioner had "made the requisite threshold showing of entitlement to relief" necessary to obtain a COA and that the panel had "justif[ied] its denial of a COA based on its adjudication of the actual merits" of petitioner's case. J.A. 290a; *see also* J.A. 292a-294a (recapping petitioner's arguments for relief under Rule 60(b)(6)). This Court granted certiorari. *Buck v. Stephens*, 136 S. Ct. 2409 (2016) (mem.).

All told, petitioner filed 163 pages of briefing in the three Fifth Circuit proceedings (after obtaining leave, in the instant proceeding, to file a reply brief in support of his COA application). *See* Dockets, Nos. 14-70030, 11-70025, 06-70035 (5th Cir.). The State filed 114 pages of responsive briefing. *See id.* And the court of appeals issued three opinions totaling 39 pages. J.A. 275a-287a; R.257-69, 831-47.

SUMMARY OF ARGUMENT

I. The court of appeals did not err in denying petitioner a COA. The court was required to do so unless petitioner made a substantial showing that (A) his ineffective-assistance-of-trial-counsel claim is meritorious and (B) the district court abused its discretion in declining to find exceptional circumstances warranting reopening of its final judgment under Rule 60(b)(6). Petitioner failed to meet his burden on each of those independent points.

A. Petitioner did not make a substantial showing of the actual prejudice required to succeed on a claim of ineffective assistance of counsel. Petitioner did not establish a "substantial" likelihood that the jury would have reached a different conclusion if petitioner's defense counsel had not proffered Quijano's report and

testimony. *Harrington v. Richter*, 562 U.S. 86, 111 (2011). The aggravating evidence of petitioner's future dangerousness—including the horrific facts of the offense, petitioner's callous lack of remorse, and his ex-girlfriend's testimony about petitioner's violence towards her—was overwhelming. And notwithstanding Quijano's opinion that race was probative of future dangerousness, his report and testimony played a limited role at trial. The challenged testimony comprised only a small fraction of Quijano's testimony that petitioner posed a low probability of future dangerousness, the prosecution did not ask the jury to consider petitioner's race, and the mitigation evidence was not nearly as strong as petitioner suggests.

B. Petitioner also did not make a substantial showing that the district court abused its discretion in concluding that petitioner's grounds for reopening the judgment under Rule 60(b)(6) failed to qualify as "extraordinary circumstance[s]." *Gonzalez*, 545 U.S. at 537. A change in decisional law is insufficient, in itself, to establish extraordinary circumstances. And the change in law at issue here—based on *Martinez*, 132 S. Ct. at 1318-19, and *Trevino*, 133 S. Ct. at 1921—does not even apply retroactively to petitioner's claim on collateral review.

But even if this new law did apply retroactively on collateral review, the particular facts of petitioner's case do not rise to the level of extraordinary circumstances justifying reopening the judgment denying the federal habeas petition. Claims of ineffective assistance of trial counsel are routine and do not present extraordinary circumstances justifying reopening a final judgment rejecting such a claim. Moreover, this second attempt to reopen the final judgment under Rule 60(b)(6)

seeks to litigate what is ultimately an unavailing claim of ineffective assistance of trial counsel—a claim that petitioner did not even raise in his first Rule 60(b)(6) motion. Whether the State previously expressed an intent to allow petitioner to litigate that claim notwithstanding procedural default is immaterial because the press statements on which petitioner relies, and the treatment of distinguishable cases involving the *prosecution* eliciting Quijano's race-related testimony, would not justify relief from the judgment.

II. Even though the court of appeals denied petitioner's application for a COA, it did so only after providing petitioner with substantial process. The court of appeals' detailed analysis, and the extensive briefing it permitted, belie petitioner's suggestion that the court ignored the substance of his claim. Nor is the Fifth Circuit's approach to adjudicating COA applications, which regularly includes comprehensive briefing from both sides and occasionally involves oral argument, inconsistent with this Court's instructions.

ARGUMENT

I. The Court of Appeals Correctly Denied Petitioner's Application for a COA.

A petitioner must obtain a COA before he may appeal a "final order in a habeas corpus proceeding." 28 U.S.C. § 2253(c)(1)(A).[3] A COA may not issue unless pe-

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[3] Petitioner has not raised, and has therefore forfeited, any argument that he was not required to obtain a COA to appeal the denial of his Rule 60(b) motion. Regardless, the denial of a Rule 60(b) motion to reopen a judgment denying a federal habeas petition constitutes a "final order in a habeas corpus proceeding," thus requiring a COA to appeal the denial of the order. *See Gonzalez*, 545 U.S. at 535 ("Many Courts of Appeals have construed 28 U.S.C. § 2253 to impose an additional limitation on appellate

titioner "has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To meet this standard, petitioner was required to show that jurists of reason would (A) find it debatable "whether the petition states a valid claim of the denial of a constitutional right" and (B) further "find it debatable whether the district court was correct in its procedural ruling" regarding extraordinary circumstances under Rule 60(b)(6). *Slack*, 529 U.S. at 484; *see, e.g., Kellogg v. Strack*, 269 F.3d 100, 104 (2d Cir. 2001) (per curiam). As explained below, petitioner failed to make either showing.

A. Petitioner has not made a substantial showing of prejudice, as required to satisfy *Strickland*'s second prong for ineffective-assistance claims.

Petitioner's federal habeas petition alleged that he was denied his constitutional right to effective assistance of trial counsel. R.66. To prevail on such a claim, a petitioner must first show that

> counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

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review by requiring a habeas petitioner to obtain a COA as a prerequisite to appealing the denial of a Rule 60(b) motion.").

Strickland, 466 U.S. at 687. Petitioner's failure to prove either deficient performance or prejudice will defeat an ineffective-assistance claim, making it unnecessary to examine the other prong. *Id.* at 697.

Under *Strickland*'s first prong, respondent agrees with petitioner that jurists of reason would at least find it debatable whether trial counsel's performance was deficient.[4] That is a necessary, but insufficient, condition to obtain a COA. *See Slack*, 529 U.S. at 483-84.

As petitioner concedes, Pet. Br. 26, 33, the second prong of *Strickland* requires him to make a substantial showing that counsel's actions resulted in actual prejudice—that is, a substantial likelihood of a different result. *Strickland*, 466 U.S. at 690-92.[5] In the capital-

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[4] The district court here found deficient performance. J.A. 263a-264a. In contrast, the Fifth Circuit explained in a previous decision in this case that petitioner "and his counsel presumably made th[e] strategic determination" to elicit Quijano's testimony, "believ[ing] that the potential benefit of Dr. Quijano's ultimate conclusion—that Buck was not likely to pose any future danger to society if incarcerated—outweighed any risk of exposing the jury to Dr. Quijano's less favorable opinions." *Buck*, 345 F. App'x at 930. The Fifth Circuit has recognized in another case involving Quijano's race-related testimony that "[t]he decision by counsel to approach the [future dangerousness] question in the relatively oblique and impersonal terms of quantitative presentation" was part of a reasonable defense strategy. *Granados v. Quarterman*, 455 F.3d 529, 535-36 (5th Cir. 2006).

[5] Petitioner does not invoke the structural-error doctrine to argue that he does not have to show prejudice. *See* Pet. Br. 34-39. Thus, respondent does not undertake to address any such argument in contesting petitioner's ineffective-assistance claim, which may be "quantitatively assessed in the context of other evidence presented." *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991)

sentencing context, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

"[T]he question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established [had] counsel acted differently." *Richter*, 562 U.S. at 111 (citation omitted). Rather, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Id.* at 112 (emphasis added) (citation omitted). This analysis does not, as petitioner suggests, turn on whether a death sentence was a "foregone conclusion." Pet. Br. 39. "*Strickland* does not require the State to 'rule out' a sentence of life in prison to prevail." *Wong v. Belmontes*, 558 U.S. 15, 27 (2009) (per curiam).

Reasonable jurists would not debate that petitioner has not shown prejudice under this standard. The aggravating evidence was overwhelming. Quijano's disputed testimony played a very limited role, and Quijano's ultimate conclusion was that petitioner would likely not be a future danger.

1. The aggravating evidence was overwhelming.

Petitioner has abandoned all but one of the grounds of ineffectiveness raised in his most recent Rule 60(b) motion. He now asserts only that his "trial counsel rendered ineffective assistance by knowingly presenting an expert opinion that [he] was more likely to commit future acts of violence because he is Black." Pet. Br. 22; *cf.* R.1067. To sentence petitioner to death, the jury had

to find unanimously that he posed a future danger. *See* Former Article 37.071. The overwhelming aggravating evidence confirms that there was not a "substantial" likelihood that petitioner was prejudiced by his counsel's performance. *Richter*, 562 U.S. at 112.

The penalty-phase evidence established an extensive basis for a finding of future dangerousness. As petitioner admits, the facts of his crimes were "undeniably 'horrific.'" Pet. Br. 39 (quoting the district court's opinion). The jury heard petitioner's own stepsister describe how petitioner shot her point-blank in the chest. J.A. 82a-83a. The jury also heard testimony from multiple witnesses about the murders of Butler and Gardner that followed. J.A. 262a; *see supra* Statement Part A.

That testimony included Gardner's daughter describing how she and her mother begged petitioner not to shoot. J.A. 114a, 116a. The jury heard that these pleas were unpersuasive, as petitioner murdered Gardner in front of her children. J.A. 116a-117a. The penalty-phase evidence also showed that petitioner had a history of domestic violence that included threatening his girlfriend with a gun and repeatedly beating her. J.A. 127a. And the jury heard evidence of petitioner's prior convictions, which included a conviction for unlawfully carrying a weapon. R.955-56 (referencing State's exhibits 63 and 67 (R.6267, 6275)). On this record, it was manifest that petitioner presented a future danger.

Respondent does not argue that the "brutality" of petitioner's crime alone necessarily "preclude[s] a finding of *Strickland* prejudice." Pet. Br. 40.[6] But the bru-

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[6] The cases petitioner cites for the proposition that "a capital prisoner may establish *Strickland* prejudice even when a crime involves appalling facts" have little bearing on this case. *See* Pet. Br. 39-41. Most of those cases involved defense counsel's failure

tality of a crime is highly relevant and probative of future dangerousness and can thus establish a lack of prejudice. *See Belmontes*, 558 U.S. at 27-28 (observing that "[i]t is hard to imagine [that] expert testimony and *additional* facts about [the defendant's] difficult childhood outweigh[ed] the facts of [the victim's] murder," which involved "clearly needless" suffering); *Martinez v. Quarterman*, 270 F App'x 277, 299 (5th Cir. 2008) (objectionable cross-examination "pale[d] in comparison to the other evidence of [defendant's] future dangerousness, especially the brutality of this double homicide"); *Lenz v. Washington*, 444 F.3d 295, 303 (4th Cir. 2006) ("repeatedly stab[bing] a defenseless victim" was "heinous and indicative of future dangerousness"); *Griffith v. Quarterman*, 196 F. App'x 237, 243 (5th Cir. 2006) (per curiam) (noting that the prosecution's case for future dangerousness was "extremely strong," in part be-

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to develop mitigating evidence or an adequate mitigation strategy. *Sears v. Upton*, 561 U.S. 945, 954-56 (2010) (per curiam); *Porter v. McCollum*, 558 U.S. 30, 42-43 (2009) (per curiam); *Williams v. Taylor*, 529 U.S. 362, 398 (2000); *Walbey v. Quarterman*, 309 F. App'x 795, 801-02 (5th Cir. 2009) (per curiam). Petitioner does not contend that his mitigation evidence was incomplete or superficial. To the contrary, he argues that his trial counsel "presented *substantial evidence* that he was not likely to be violent in prison." Pet. Br. 42 (emphasis added).

Although *Satterwhite v. Texas*, 486 U.S. 249, 259-60 (1988), dealt with improperly admitted expert testimony on future dangerousness, the expert testified for the *State*, which "placed significant weight on [the expert's] powerful and unequivocal testimony" that Satterwhite was a "ten plus" sociopath who was "beyond the reach of psychiatric rehabilitation." Here, the State presented no expert on this issue, whereas defense counsel presented two clinical psychologists who testified that petitioner had a low probability of future dangerousness. J.A. 147a, 148a, 150a; R.6068, 6094-96.

cause the "facts of the crime were horrific and brutal"); *see also United States v. Lujan*, 603 F.3d 850, 854–55 (10th Cir. 2010) (prosecution's evidence of a separate double homicide allegedly committed by the defendant was improperly excluded because it "involved cold, calculated, and brutal conduct," which "has a strong tendency to show Lujan has a propensity for violence and future dangerousness").

And as explained in one of the cases petitioner cites, the "brutal nature" of a crime combined with a "lack of contrition and remorse" is sufficient for a Texas jury to find that a capital defendant presents a continuing threat to society. *Dewberry v. State*, 4 S.W.3d 735, 743 (Tex. Crim. App. 1999) (cited in Pet. Br. 41 n.7). Petitioner thus concedes that his lack of remorse is relevant. Pet. Br. 41 n.7. But he then attempts to disaggregate the evidence, suggesting that neither the "brutality of a capital crime" nor his "lack of remorse" alone supported a finding of future dangerousness. Pet. Br. 39-40, 40, 41 n.7. The jury here, of course, heard evidence of *both* a horrendous crime *and* petitioner's callous lack of remorse. Besides the facts of petitioner's brutal shooting spree just noted, the jury heard testimony that petitioner stood over Gardner as she lay dying in the street and said: "'It ain't funny now. You ain't laughing now." J.A. 106a. The jury also heard that petitioner was laughing about the murders when he was arrested and that he commented to the arresting officer: "The bitch got what she deserved." J.A. 135a.

Petitioner severely downplays the weight of the State's evidence of future dangerousness. *See* Pet. Br. 41-43. Without denying his lack of remorse "in the immediate wake of the crime," petitioner claims that jurors knew that he "had shown remorse after having

time to reflect on his actions." Pet. Br. 41. The prosecution, however, did not rest solely on petitioner's statement to Gardner immediately before she died. *Cf.* Pet. Br. 42 (suggesting that remorseful conduct is rarely present during commission of a crime). The jury also heard several witnesses testify about petitioner's laughter and statements after his arrest. J.A. 71a, 89a, 118a, 133a-135a.

Petitioner also misguidedly relies on two facts: (i) Taylor's post-conviction statement that petitioner had subsequently sought and received her forgiveness and (ii) petitioner's own act of crying during trial testimony. Pet. Br. 41-42 & n.8. Taylor's statement was made *after* the penalty phase of petitioner's trial. For that reason, it plays no role in the *Strickland* analysis and could not call into doubt the outcome of the jury's deliberations. *See Richter*, 562 U.S. at 112. And petitioner's act of crying while witnesses testified against him could be viewed as fear of the consequences of the killings, rather than remorse. *See, e.g.*, *United States v. Santiago-González*, 825 F.3d 41, 50 n.13 (1st Cir. 2016); *Brady v. Pfister*, 711 F.3d 818, 827-28 (7th Cir. 2013); *Nields v. Bradshaw*, 482 F.3d 442, 459-60 (6th Cir. 2007). In this case especially, petitioner's crying at trial pales in force compared to the shocking lack of remorse he demonstrated at the time of the crime and after his arrest.

2. The limited role that Quijano's report and testimony played did not outweigh the overwhelming aggravating evidence.

Petitioner's arguments about Quijano's report and testimony are further weakened by the nature of his claim. Petitioner does not contend, as he intimated in

district court, *see* R.1067, that reasonable trial counsel would have found another expert to testify in place of Quijano.[7] Petitioner thus argues only that trial counsel should not have presented Quijano and should have instead relied only on Lawrence for expert testimony. Pet. Br. 22, 25, 32; *see* R.6068, 6094-96 (Lawrence's testimony that petitioner would not likely be a future danger).

Strickland's prejudice analysis "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Here, Quijano's testimony played a limited role, was elicited by defense counsel, and must be assessed against the overwhelming aggravating evidence.

a. Petitioner's brief focuses on Quijano's testimony that petitioner was more likely to pose a future danger because of his race. But Quijano opined that, if petitioner were sentenced to life in prison, there would be a "low" probability that he would commit criminal acts of violence that would be a continuing threat to society. J.A. 150a.

Quijano further stated that the absence of assaults by petitioner while he was incarcerated was "a good sign that [he] is controllable within a jail or prison setting" and that prisoners serving life sentences "consti-

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[7] An ineffective-assistance claim based on counsel's failure to call a witness must "name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable to a particular defense." *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). Petitioner does not contend that he laid the necessary foundation for such a claim.

tute a good subsection of the prison system," whereas inmates serving shorter sentences "create trouble in the prison system, mischief, fighting." J.A. 150a. Quijano also agreed that there was a "disciplinary system within the prison system that effectively controls inmates." J.A. 151a. And after telling the jury that the "narrower the victim pool, the less dangerous the person will be in the future," Quijano explained his view that petitioner's victim pool in prison was "narrow," as petitioner's "probability of developing a dependent relationship" in prison "would be very small." J.A. 147a, 148a.

Quijano did explain that race was one of seven "statistical factors" he considered in determining likelihood of future dangerousness. J.A. 145a-147a. And Quijano's report listed petitioner's race as one of the seven "statistical factors" he considered. J.A. 18a-19a (capitalization altered). But of the twenty-three lines of the Joint Appendix that comprise his "statistical factor" explanation, Quijano's direct testimony regarding race spans just three lines. J.A. 146a. Quijano's report, which spans ten Joint Appendix pages, J.A. 14a-23a, contains only two lines regarding race, J.A. 19a. And defense counsel concluded his questioning of Quijano about the "statistical factors" by asking whether a defendant such as petitioner, who had no prior violent offenses, would be less likely "to be dangerous or commit acts of violence in the future." J.A. 147a. Quijano agreed that petitioner would be less likely to do so. J.A. 147a.

On cross-examination, the prosecutor mentioned Quijano's race-as-dangerousness testimony only once, when canvassing the various factors contained in Quijano's report, J.A. 170a—which the trial court had already ruled would be admitted into evidence, R.6029-31.

The prosecutor thus did not "compound[] defense counsel's error by eliciting *additional* testimony from Dr. Quijano." Former Prosecutors' Amicus Br. 3 (emphasis added). Nor did the prosecutor's single question in passing "exploit[]" Quijano's statement. Pet. Br. 7. "[T]his colloquy did not go beyond what defense counsel had already elicited on direct examination." *Buck*, 132 S. Ct. at 34 (Alito, J., respecting the denial of certiorari).

Amici suggest that the prosecutor either knowingly relied on the falsity that race was probative of future dangerousness or demonstrated personal racial bias by even mentioning this aspect of Quijano's report. Former Prosecutors' Amicus Br. 10. That suggestion ignores the reality that the prosecutor was merely reviewing the entirety of Quijano's testimony without expressing either agreement or disagreement with Quijano's views. That is sometimes how prosecutors proceed when walking through an expert report to decide whether any particular item deserves a probing question on cross-examination. And after this portion of his testimony, Quijano stuck to his opinion that petitioner's probability of future dangerousness was low. *See* J.A. 176a.

Contrary to petitioner's suggestions, Pet. Br. 8, 18-19, the prosecution did not mention race in its closing arguments. J.A. 184a-186a, 196a-206a. The prosecution noted only that Quijano had testified that the probability of future dangerousness, while low, was still present. J.A. 198a-199a. Quijano's cross-examination had closed on this point, with Quijano acceding to the prosecutor's point that petitioner had a greater probability of being a danger in the future given his laughing and lack of

remorse after his extremely violent murders. J.A. 175a-176a.

b. Given the nature and context of Quijano's testimony, this case is nothing like others involving repeated or direct pleas by the prosecution that the jury consider race or ethnicity as evidence of criminality. *Cf.* Pet. Br. 34-38 (citing *United States v. Cruz*, 981 F.2d 659, 664 (2d Cir. 1992) (prosecutor "repeatedly" referred to defendant's ethnicity "as evidence of criminal behavior"); *Reed v. State*, 99 So. 2d 455, 456 (Miss. 1958) (prosecutor told the jury that "'if you don't stop them now, they will next be robbing white people'"); *Allison v. State*, 248 S.W.2d 147, 148 (Tex. Crim. App. 1952) (prosecutor "sought to condemn as a class all testimony coming from members of the colored race" to discredit a defense witness); *Dinklage v. State*, 185 S.W.2d 573, 575 (Tex. Crim. App. 1945) (prosecutor's closing argument referenced defendant's German heritage)).

This case is also distinguishable from ones in which the prosecution made inflammatory race-based statements. *See* Pet. Br. 37-38 (citing *Johnson v. Rose*, 546 F.2d 678, 679 (6th Cir. 1976) (per curiam) (appeal to racial prejudice by a United States Attorney); *United States v. Haynes*, 466 F.2d 1260, 1266-67 (5th Cir. 1972) (prosecutor's use of phrase "[b]urn, baby, burn" as a "racial shibboleth"); *Bryant v. State*, 25 S.W.3d 924, 925 (Tex. App. 2000) (prosecutor's question whether defendant had gotten a "white girl" pregnant); *Cofield v. State*, 82 S.E. 355, 356 (Ga. Ct. App. 1914) (prosecutor's statement that this "was the most horrible case he ever saw in court, a negro going to a white man's yard .. and threatening to kill him"); *Louisiana v. Bessa*, 38 So. 985, 987 (La. 1905) (prosecutor appealed to race for no apparent reason other than to "draw the color line")).

None of these cases involves testimony or reports from a defense expert, let alone from a defense expert who concluded that the defendant presented a low probability of future dangerousness. Petitioner is thus wrong that Quijano's testimony is insurmountably prejudicial under settled law. *See* Pet. Br. 36-38. And petitioner concedes that *defense counsel* elicited Quijano's race-related opinion. *See* Pet. Br. 36.

c. As additional mitigating evidence, petitioner stresses the "substantial evidence that he was not likely to be violent in prison," the prosecutor's purported failure to "dispute any of this evidence," and the fact that jury deliberations took two days. Pet. Br. 42-43. These remaining points likewise do not suggest a substantial likelihood that the sentencing outcome would have been different.

Petitioner overemphasizes the favorability of his expert Lawrence's testimony. Petitioner contends that the jury heard "undisputed testimony from Lawrence that [petitioner]'s prison records showed that he 'did not present any problems in the prison setting'" and that petitioner "had been held in minimum security without incident." Pet. Br. 42 (quoting R.6088). In fact, Lawrence merely observed that petitioner's county and state jail records indicated that petitioner had been held only in minimum security. *See* R.6084, 6087-88. When defense counsel asked what this fact indicated, Lawrence replied that it told him that petitioner "did not present any problems in the prison setting." R.6088. It is at best speculative to extrapolate, from this narrow testimony about petitioner's confinement history, that the jury heard "substantial evidence" that petitioner "was not likely to be violent in prison" while serving a life sentence for murder. Pet. Br. 42.

Petitioner asserts that his violent acts occurred within romantic relationships, arguing that he would not be a future danger because he would not be involved in romantic relationships in prison. Pet. Br. 6-7, 25, 41. But petitioner shot his stepsister at point blank range, and his stepsister was not part of any of petitioner's romantic relationships. Petitioner's assertion that he would not be violent in prison also overlooks testimony confirming that he would likely have illicit access to drugs and alcohol, as well as access to improvised weapons, in prison. J.A. 171a-174a. Even though petitioner committed the murders at issue with a firearm, the availability of makeshift weapons in prison is significant because the jury heard petitioner's ex-girlfriend testify that petitioner had beaten her with a belt and a coat hanger and had even used a cast on his arm to beat her head. J.A. 127a.

Finally, the fact that the jury asked to see "the psychology reports" and "police records" during its deliberations, J.A. 209a, does not suggest that the jury was focused on Quijano's *race-related* testimony or that it was likely to have reached a different conclusion absent Quijano's report and testimony. *Cf.* Pet. Br. 43; Lawyers' Comm. Amicus Br. 30. These additional facts do not come close to establishing a "substantial" likelihood of a different outcome, as required by *Richter*, 562 U.S. at 112. Petitioner therefore did not make a substantial showing of prejudice.

B. Petitioner has not made a substantial showing that the district court abused its discretion in declining to find "extraordinary circumstances" to reopen a final judgment.

Even assuming arguendo that reasonable jurists could debate whether petitioner established prejudice under *Strickland*, the court of appeals correctly denied petitioner's COA application for a separate, independent reason: reasonable jurists could not debate whether the district court abused its discretion in its procedural ruling denying petitioner's second request to reopen the final judgment under Rule 60(b)(6). *Slack*, 529 U.S. at 484.

"Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case," but only "under a limited set of circumstances." *Gonzalez*, 545 U.S. at 528. Petitioner cannot obtain relief under Rule 60(b)(6) unless "extraordinary circumstances" are present in his case. *Id.* at 535 (citation and quotation marks omitted). And this Court specifically has cautioned that "[s]uch circumstances will rarely occur in the habeas context." *Id.* When evaluating extraordinary circumstances, a "very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved." *Id.* (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 873 (1988) (Rehnquist, C.J., dissenting)). Review of Rule 60(b) determinations is thus highly deferential. *See id.* (citing *Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 263 n.7 (1978)).

Indeed, as petitioner concedes, a district court's resolution of this question "is reviewed under the abuse-of-discretion standard." Pet. Br. 54. And although petitioner notes that "a district court necessarily abuses its discretion when its judgment is based on an error of

law," Pet. Br. 54, he elsewhere concedes that the Rule 60(b) determination in this case required a "fact-intensive inquiry," Pet. Br. 47. Consequently, the "deference that is the hallmark of abuse-of-discretion review" applies with full force in this context. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997).

To obtain a COA, petitioner had to make a substantial showing not merely that a reasonable appellate judge would find extraordinary circumstances in the first instance, but that the basis for the district court's ruling was so utterly lacking that the district court abused its discretion in failing to reopen the final judgment denying habeas relief. *See Slack*, 529 U.S. at 484; *Leedo Cabinetry v. James Sales & Distrib., Inc.*, 157 F.3d 410, 412 (5th Cir. 1998) ("We will not disturb a district court's decision to deny relief under Rule 60(b) 'unless the denial is so unwarranted as to constitute an abuse of discretion.'" (quoting *Bludworth Bond Shipyard, Inc. v. M/V Caribbean Wind*, 841 F.2d 646, 649 (5th Cir. 1988)); *see also* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2872, pp. 594-95 n.6 (3d ed. 2012) (collecting cases applying a similarly deferential standard of review to Rule 60(b) rulings).

A survey of cases highlights the truly extraordinary nature of the circumstances that qualify. One court of appeals concluded, for example, that circumstances were sufficiently extraordinary to justify relief from a habeas judgment where a prison guard had affirmatively thwarted an inmate's timely appeal. *Tanner v. Yukins*, 776 F.3d 434, 436-37, 442-44 (6th Cir. 2015). Rule 60(b) relief was also found appropriate where a petitioner with a learning disability relied on another inmate to prepare his appeal, that inmate failed to file a

timely appeal, and the time for an extension had passed. *Davenport v. Tribley*, No. 2:07-cv-14248, 2011 WL 669240, at *3 (E.D. Mich. Feb. 17, 2011). And another district court concluded that circumstances were also sufficiently extraordinary to justify reopening a judgment where petitioner's habeas counsel "effectively abandoned him." *Andrade v. Cate*, No. 2:09-cv-02270, 2013 WL 5375836, at *2 (E.D. Cal. Sept. 24, 2013).

Petitioner did not meet his heavy burden to show extraordinary circumstances. The change in decisional law established in *Martinez* and *Trevino* is insufficient. Moreover, in this second Rule 60(b)(6) motion, petitioner seeks to relitigate an ineffective-assistance claim that he did not even raise in his first Rule 60(b)(6) motion. At base, the particular facts of petitioner's case do not rise to the level of extraordinary circumstances justifying relief from the denial of his federal habeas petition—much less so clearly as to make a contrary judgment an abuse of the district court's broad discretion.

1. The change in decisional law effected by *Martinez* and *Trevino* is insufficient to establish extraordinary circumstances.

As petitioner concedes, the change in law effected by *Martinez* and *Trevino* alone does not qualify as an extraordinary circumstance under Rule 60(b). *See* Pet. Br. 56 ("To be sure, not every case involving a viable *Martinez* claim may justify reopening the judgment under Rule 60(b)."). That follows from *Gonzalez*, in which the Court expressly held that a change in decisional law (there, a new interpretation of the statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")) did not constitute extraordinary circumstances under Rule 60(b). *See* 545

U.S. at 536 (stating that "[i]t is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation" of AEDPA). Thus, *Gonzalez* recognized that whether extraordinary circumstances exist turns on the specific facts "in petitioner's case." 545 U.S. at 537.

Petitioner's concession is in keeping with the decisions of the courts below. As the district court noted, the Fifth Circuit has held that a change in decisional law alone does not amount to extraordinary circumstances. J.A. 260a (citing *Adams v. Thaler*, 679 F.3d 312, 319-20 (5th Cir. 2012) (recognizing that the decisional law change in *Martinez* alone is insufficient to establish extraordinary circumstances)); *see Diaz v. Stephens*, 731 F.3d 370, 375-77 (5th Cir. 2013) (same with regard to *Trevino*).

But petitioner's suggestion that the Fifth Circuit has categorically refused to consider the *Martinez* change in law as a "relevant factor," Pet. Br. 58, is incorrect. In this case, the Fifth Circuit did not reject petitioner's claim of extraordinary circumstances merely on the ground that *Martinez* and *Trevino* were insufficient to overcome the procedural default. It examined all of the particular facts raised by petitioner. *See* J.A. 282a-287a. Likewise, as the Third Circuit has explained, "more than the concededly important change of law wrought by *Martinez* is required—indeed, much more is required." *Cox v. Horn*, 757 F.3d 113, 115 (3d Cir. 2014) (quotation marks omitted); *see also Ramirez v. United States*, 799 F.3d 845, 850-51 (7th Cir. 2015) (agreeing with *Cox* and the Third Circuit's analysis of a Rule 60(b) motion "built upon a postjudgment change in the law," which "takes into account all the particulars of a movant's case" (quoting 757 F.3d at 122)).

There is, however, another reason petitioner cannot rely on *Martinez* and *Trevino* to establish extraordinary circumstances: *Martinez* and *Trevino* do not apply retroactively to cases on collateral review.[8] *See* 28 U.S.C. § 2244(b)(2)(A); *Teague v. Lane*, 489 U.S. 288, 299-316 (1989) (plurality opinion). As the Fifth Circuit has correctly explained, this Court has not made either *Martinez* or *Trevino* retroactive to cases on collateral review. *In re Paredes*, 587 F. App'x 805, 813 (5th Cir. 2014) (per curiam). And in the present case, the Court has not granted certiorari on the question whether *Martinez* or *Trevino* apply retroactively.

To the extent a change in decisional law creates a new rule, petitioner must show that this Court has made the rule retroactively applicable to cases on collateral review. *See Teague*, 489 U.S. at 316 (plurality opinion). Under *Teague*, "a new rule can be retroactive to cases on collateral review if, and only if, it falls within one of two narrow exceptions to the general rule of nonretroactivity." *Tyler v. Cain*, 533 U.S. 656, 665 (2001). The first exception is for new substantive rules of criminal law, which "narrow the scope of a criminal statute by interpreting its terms," or "place particular conduct or persons covered by the statute beyond the State's power to punish." *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004) (citations omitted); *see also Teague*, 489 U.S. at 311 (plurality opinion). The second exception is

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[8] In 2004, when petitioner first raised an ineffective-assistance claim in federal court, procedural default could not be overcome by establishing state habeas counsel's ineffectiveness. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991). *Martinez* and *Trevino* later held that ineffective assistance by state habeas counsel could overcome procedural default of a claim of ineffective assistance of trial counsel.

for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Graham v. Collins*, 506 U.S. 461, 478 (1993) (citation and quotation marks omitted).

The rule announced in *Trevino* does not fall within either of the two *Teague* exceptions. *Martinez* and *Trevino* established a new procedural rule, so it cannot be a new substantive rule of criminal law within *Teague*'s first exception. *See* 489 U.S. at 311 (plurality opinion). Nor does this procedural rule qualify as a "bedrock procedural element," *id.* at 315; an "absolute prerequisite to fundamental fairness," *id.* at 314; or a "rule[] requiring 'observance of those procedures that . are implicit in the concept of ordered liberty,'" *Graham*, 506 U.S. at 478 (quoting *Teague*, 489 U.S. at 311 (plurality opinion)). As the Court noted in *Graham*, it is "unlikely that many such components of basic due process have yet to emerge." *Id.* (citation and quotation marks omitted).

The rule announced in *Martinez* and *Trevino* is not a "watershed" rule like that announced in *Gideon v. Wainwright*, 372 U.S. 335 (1963). "There is no constitutional right to an attorney in state post-conviction proceedings," so there is no attendant watershed, bedrock right to effective assistance of counsel in those proceedings. *Coleman*, 501 U.S. at 752. *Coleman* "left open" the question "whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial." *Martinez*, 132 S. Ct. at 1315. But instead of resolving that question, *Martinez* recognized a "narrow exception" that state habeas counsel's ineffective assistance "may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial," *id.*,

and *Trevino* made that rule applicable in capital cases in Texas. 133 S. Ct. at 1917.

That type of "incremental change" does not amount to an "absolute prerequisite to fundamental fairness." *Beard v. Banks*, 542 U.S. 406, 419 (2004) (discussing *Sawyer v. Smith*, 497 U.S. 227, 244 (1990) (quoting *Teague*, 489 U.S. at 314 (plurality opinion)) (quotation marks omitted))). Because petitioner has not shown that he could actually invoke this new, retroactive rule if he were able to reopen the judgment denying his federal habeas petition, the *Martinez* and *Trevino* change in law is "all the less extraordinary in petitioner's case." *Gonzalez*, 545 U.S. at 537.

2. The particular facts of petitioner's case do not establish extraordinary circumstances justifying relief from the judgment.

Petitioner cites several authorities that confirm what *Gonzalez* recognized: whether extraordinary circumstances exist, for purposes of Rule 60(b), turns on the specific facts "in petitioner's case." *Gonzalez*, 545 U.S. at 537; *see* Pet. Br. 46-47. Ultimately, petitioner argues that the "*sui generis* facts of this case (at, and after, trial)—combined with [petitioner]'s diligence and the change in law worked by *Trevino* and *Martinez*—establish the 'extraordinary circumstances' required by Rule 60(b)." Pet. Br. 23. Petitioner bases his argument on the eleven supposed "facts" recited in his Rule 60(b) motion. *See* J.A. 283a-285a. Petitioner faults the district court for considering these circumstances "individually" rather than "holistic[ally]," Pet. Br. 54, but there is no indication that either court below failed to analyze and resolve all of the "facts" together.

As the court of appeals noted, five of those "facts" were "just variations on the merits" of petitioner's ineffective-assistance claim, J.A. 285a, and two "merely point[ed] out that [petitioner]'s [ineffective-assistance] claim was procedurally defaulted and did not get a merits determination." J.A. 285a-286a. Petitioner's remaining "facts" focused on the change in law effected by *Martinez* and *Trevino* and the alleged "broken-promise" in light of the State's confession of error in *Saldano*. J.A. 286a-287a. As the court of appeals concluded, it is beyond reasonable debate that the district court acted within its discretion in declining to find those "facts" extraordinary for purposes of Rule 60(b).

a. As already noted, the overwhelming aggravating evidence in this case foreclosed petitioner's ability to establish the prejudice element of his ineffective-assistance claim. *See supra* Part I.A. A change in decisional law that allows a habeas petitioner to litigate an unavailing ineffective-assistance claim is not an extraordinary circumstance within the meaning of Rule 60(b)(6). *See Ramirez*, 799 F.3d at 851 ("[B]earing in mind the need for the party invoking [Rule 60(b)] to demonstrate why extraordinary circumstances justify relief," courts should consider "whether the underlying claim is one on which relief could be granted."); *Cox*, 757 F.3d at 122.

The fact that petitioner's first Rule 60(b) motion did not even contend that his trial counsel's performance was deficient makes *Martinez* and *Trevino* even less relevant. Petitioner argues that state habeas counsel's failure to assert, in the initial state habeas application, that trial counsel was ineffective is "cause" to overcome procedural default because "trial counsel's error was so egregious that no reasonable post-conviction attorney

could have overlooked it." Pet. Br. 46 (citing *Detrich v. Ryan*, 740 F.3d 1237, 1246 (9th Cir. 2013) (en banc)).

But petitioner had new post-conviction counsel when he filed his initial Rule 60(b) motion in federal court, where he argued that a "promise" by the Attorney General allowed reopening the final judgment. R.285-89. Even in that motion, however, petitioner did not claim that his trial counsel's effectiveness was a basis for habeas relief. *See* R.273-90. He raised constitutional claims regarding the *prosecutor*'s questioning of Quijano, but he did not argue that his own trial counsel was deficient in eliciting Quijano's testimony or putting his report into evidence. *See* R.485 (district-court order reflecting that petitioner's motion raised the same due-process and equal-protection claims that the Fifth Circuit had confirmed were procedurally defaulted, *see Buck*, 345 F App'x at 926, 928). Consequently, the change in law effected by *Martinez* and *Trevino* is "all the less extraordinary in petitioner's case[] because of his lack of diligence in pursuing" his ineffective-assistance claim. *Gonzalez*, 545 U.S. at 537; *cf.* Pet. Br. 53-54.

Regardless, under petitioner's theory, state habeas counsel's ineffectiveness, if any, would turn on the existence of trial counsel's ineffectiveness. *Cf. Martinez*, 132 S. Ct. at 1318-19 (petitioner must establish that state habeas counsel "was ineffective under the standards of [*Strickland*]" by showing, among other things, that the underlying claim "should have been raised" by state-habeas counsel). Because petitioner cannot demonstrate the prejudice necessary to support his ineffective-assistance-of-trial-counsel claim, *see supra* Part I.A, state habeas counsel neither performed deficiently nor prejudiced petitioner by failing to raise that

claim, *see Strickland*, 466 U.S. at 694. Petitioner is thus incorrect in stating that state habeas counsel's ineffectiveness is undisputed or would be properly resolved through an evidentiary hearing. Pet. Br. 46 n.10.

b. Petitioner repeatedly asserts that his case is extraordinary because the State purportedly "reneged on its promise" that "it would not oppose [a] new sentencing hearing." Pet. Br. 3; *see* Pet. Br. 12, 14, 19, 20, 22-23, 46, 48, 49, 51, 52-53, 55, 58. But as the court of appeals noted, "[i]t has never been established that the [Attorney General]'s office promised not to raise procedural defenses in [petitioner]'s case." J.A. 277a n.1. In particular, the court "found no statement by the [Attorney General] in the record in which he confessed error relating to [petitioner]'s case and promised not to raise procedural defenses." J.A. 277a n.1.

The court of appeals further explained that, even assuming arguendo that "the [Attorney General] initially indicated to [petitioner] that he would be resentenced," petitioner has never shown "why the alleged reneging would justify relief from judgment." J.A. 286a-287a. Petitioner has no valid response to that point.

Petitioner concedes that any supposed "promise" to waive procedural defenses in federal habeas litigation appeared only in press statements. *See* Pet. Br. 11-12. It is beyond dispute that those statements were made outside of any judicial proceeding, and the State never waived procedural default in a legal proceeding in this case. *See Buck*, 132 S. Ct. at 34 (Alito, J., respecting the denial of certiorari) (noting that "the present case is different from the others in which, as a result of similar testimony by Dr. Quijano, the State did not assert procedural default"); *cf., e.g., New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (noting that when "a party as-

sumes a certain position *in a legal proceeding*, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position" (emphasis added) (citation and quotation marks omitted)).

Nor does the record in this case "make[] it clear that Texas promised to treat [petitioner]'s case similarly to *Saldano*," Pet. Br. 11-12 n.2, in all respects. The State continues to maintain, as expressed in its response to Saldano's petition for a writ of certiorari, that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice" and that "the use of race in Saldano's sentencing seriously undermined the fairness, integrity, or public reputation of the judicial process." J.A. 304a, 305a (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

But as the district court explained in denying petitioner's first Rule 60(b) motion, petitioner "has identified no legal basis for a claim that the Attorney General's statement created legally enforceable rights or that it precluded the Attorney General from later identifying distinguishing facts that made [the General's] initial assessment inapplicable to this case." R.487. That matters because even if circumstances are "odd and factually unusual," J.A. 286a, they cannot support Rule 60(b)(6) relief unless they are "extraordinary circumstances '*justifying relief from the judgment.*'" J.A. 286a (emphasis added) (paraphrasing Fed. R. Civ. P. 60(b) (title)); *see Gonzalez*, 545 U.S. at 535. Because petitioner cannot show that he "relied on the alleged promised to his detriment," petitioner cannot show that the "alleged reneging would justify relief from the judgment." J.A. 287a. Petitioner is thus wrong that the court of ap-

peals' conclusion was mere "*ipse dixit*." Pet. Br. 58. It was a straightforward application of *Gonzalez*, and an evidentiary hearing "about the details of [that] promise," Pet. Br. 12 n.2, would be both improper and unnecessary.

Petitioner's case is significantly different from the five other cases identified as similar to *Saldano* by former Attorney General Cornyn in a press release following *Saldano*. *See* J.A. 215a-217a. "Only in Buck's case did defense counsel elicit the race-related testimony on direct examination." *Buck*, 132 S. Ct. at 34-35 (Alito, J., respecting the denial of certiorari). Regardless of what Attorney General Cornyn said in a press statement in 2000, *see* Pet. Br. 11 (citing J.A. 213a, 215a-217a), petitioner's case was pending in state court at the time, and was therefore being handled by the Harris County District Attorney—rather than the Texas Attorney General, who represents the state-official respondents in federal habeas proceedings (and the State in state habeas proceedings if requested by a county district attorney). *See* Tex. Code Crim. Proc. art. 2.01; Tex. Gov't Code § 402.028; Pet. Br. 12.

The Attorney General's Office took over petitioner's case when it reached federal court and correctly argued that it was notably different from *Saldano*, *Gonzales*, *Broxton*, *Garcia*, *Alba*, and *Blue*.[9] In *Saldano*, *Gonzales*, *Broxton*, and *Garcia*, "the prosecution called Dr. Quijano and elicited the objectionable testimony on di-

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[9] *See Saldano*, 530 U.S. 1212; *Gonzales v. Cockrell*, No. 7:99-cv-00072 (W.D. Tex. Dec. 19, 2002); *Broxton v. Johnson*, No. 4:00-cv-01034 (S.D. Tex. Mar. 28, 2001); *Garcia v. Johnson*, No. 1:99-cv-00134 (E.D. Tex. Sept. 7, 2000); *Alba v. Johnson*, 232 F.3d 208 (5th Cir. 2000) (table) (per curiam); *Blue v. Johnson*, No. 4:99-cv-00350 (S.D. Tex. Sept. 29, 2000).

rect examination." *Buck*, 132 S. Ct. at 34 (Alito, J., respecting the denial of certiorari). In *Alba* and *Blue*, "while the defense called Dr. Quijano, the objectionable testimony was not elicited until the prosecution questioned Dr. Quijano on cross-examination." *Id.* Thus, as three Justices of this Court have recognized, among these cases, petitioner's "is the only case in which it can be said that the responsibility for eliciting the offensive testimony lay squarely with the defense." *Id.* at 35.[10]

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[10] In responding to petitioner's federal habeas petition, the State initially did erroneously distinguish petitioner's case from *Saldano* and the other cases in which the State confessed error on the grounds that "Dr. Quijano testified for the State" in those cases. R.155 (emphasis omitted). In actuality (and as just noted), "the defendants in both *Blue* and *Alba* called Quijano to the stand." *Buck*, 132 S. Ct. at 37 (Sotomayor, J., dissenting from the denial of certiorari). Petitioner focused on this misstatement in his first Rule 60(b) motion. *See* R.273-89 (petitioner's September 7, 2011 Rule 60(b) motion). In the State's response to that motion, which was filed two days later in the course of accelerated briefing shortly before petitioner's scheduled execution, *see* R.429-32, the State again misidentified *Alba* as a case in which the prosecution had called Quijano, and it did not address *Blue*, R.464; *see Buck*, 132 S. Ct. at 37 (Sotomayor, J. dissenting from the denial of certiorari). Petitioner raised this second mistake in his motion for Rule 59(e) relief. *See* R.493-512.

On appeal, the State corrected its errors, noting that "although the defendants in [*Alba*] and [*Blue*] each proffered Quijano as a witness, they did not, like [petitioner], elicit race-related testimony on direct examination; instead, the prosecution first did so on cross-examination." *Buck*, 132 S. Ct. at 37 (Sotomayor, J. dissenting from the denial of certiorari); *e.g.*, *Buck v. Thaler*, No. 11-70025, Doc. 00511602284 at 40 (5th Cir. Sept. 14, 2011) (State's opposition to petitioner's COA application acknowledging the State's previous error but explaining that "[r]egardless of who *sponsored* Quijano's testimony, the real concern is *who proffered the race-based opinion*," and that

* * *

In sum, petitioner's request for a COA was not "supported by any evidence demonstrating" an entitlement to relief. *Miller-El*, 537 U.S. at 340. For that reason, no reasonable jurist could conclude that the district court abused its discretion in denying petitioner's second Rule 60(b)(6) motion.

II. Petitioner Received Substantial Process.

A. Petitioner argues that the court of appeals "fail[ed] to 'give full consideration to the substantial evidence' of extraordinariness presented" by petitioner. Pet. Br. 57 (quoting *Miller-El*, 537 U.S. at 341). That is not a fair characterization of the process petitioner received. Even though the court of appeals ultimately denied petitioner's request for a COA, it did so only after years of litigation, involving significant process, regarding Quijano's race-related testimony at the penalty phase of petitioner's trial.

Respondent does not dispute that this case presents "odd and factually unusual" circumstances. J.A. 286a. The question for the court of appeals was whether, under existing law, reasonable jurists could debate whether the district court abused its discretion in determining that no extraordinary circumstances existed to reopen the judgment under Rule 60(b). Existing law included this Court's admonition in *Gonzalez* that Rule 60(b) extraordinary circumstances "will rarely occur in the habeas context," 545 U.S. at 535, and a limited pool of precedent finding extraordinary circumstances in that context. *See* J.A. 282a, 285a (relying on this statement

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"the court below was hardly unaware of *Blue* and *Alba* as both were cited in Buck's [Rule 60(b)] motion").

from *Gonzalez* and noting that "[t]here is little guidance as to what constitutes 'extraordinary circumstances'" in habeas cases).

In considering how the case should be resolved in light of existing precedent, the court of appeals did not "ignore" the race-related testimony underpinning petitioner's arguments. Pet. Br. 57. The court quoted Quijano's race-related testimony, acknowledged that his testimony tracked his report, quoted the prosecutor's cross-examination of Quijano regarding his opinion about race, and noted what the prosecutor said regarding Quijano in her closing statement. J.A. 276a. The court of appeals also referenced its previous explanation of how it would decide the merits of petitioner's due-process and equal-protection claims, which were based on the prosecution's reference to Quijano's race-related testimony. J.A. 278a (citing *Buck*, 345 F. App'x at 930). And it cited the opinions from Justices of this Court regarding the denial of petitioner's earlier certiorari petition, which likewise analyzed the race-related evidence presented at the penalty phase of petitioner's trial. J.A. 278a-279a.

The court of appeals went on to quote the "eleven facts," most of which focused on Quijano's race-related evidence, "that [petitioner] says make the case extraordinary." J.A. 283a-285a. The court also granted petitioner leave to file a reply brief to supplement the argument that he had already presented in his 70-page opening brief. *See* J.A. 3a. And in deciding whether a COA should issue, the court of appeals did not deny relief in a summary order without analyzing petitioner's ineffective-assistance claim. It addressed each of the points that petitioner raised, explaining why they did not warrant the extraordinary remedy of Rule 60(b) re-

lief and why reasonable jurists could not debate that point under existing law. J.A. 285a-287a.

In his dissent from the denial of rehearing en banc, Judge Dennis faulted the panel for "adjudicati[ng] . . . the actual merits" of petitioner's claim. J.A. 290a. But even the COA-stage review that Judge Dennis indicated was appropriate would address the merits to some degree, and a court of appeals should not be faulted for erring on the side of more process, rather than less. Accordingly, even if this Court were to conclude that a COA should have been granted, the court of appeals' analysis and the extensive briefing it permitted belies the assertion that the substance of petitioner's claim was ignored—particularly in light of the lengthy procedural history of the case. *See* J.A. 275a; *see also* Criminal Defense Lawyers' Amicus Br. 3-4 (recognizing that the court of appeals "conduct[ed] a detailed analysis of the merits" of petitioner's claim).

B. Citing charts reflecting dispositions of COA applications in the Fourth, Fifth, and Eleventh Circuits, petitioner argues that the Fifth Circuit's approach is, more generally, inconsistent with this Court's precedents. Pet. Br. 57 (citing Pet. Br. App.). But the Court has advised that it is not appropriate to grant a COA in every capital habeas case, explaining that "issuance of a COA must not be *pro forma* or a matter of course." *Miller-El*, 537 U.S. at 337. Rather, the COA must serve a "gatekeeping function." *Gonzalez v. Thaler*, 132 S. Ct. 641, 650 (2012). In light of that guidance, it is quite questionable whether a zero-percent capital COA denial rate in the Fourth Circuit, *see* Pet. Br. 57, serves a gatekeeping function—let alone whether such a practice is more consistent with this Court's precedents than the

Fifth Circuit's practice of denying some capital COA applications after providing extensive process.[11]

In fact, the Fifth Circuit occasionally hears oral argument when considering whether to grant a COA in a capital case. For example, in *Allen v. Stephens*, 805 F.3d 617 (5th Cir. 2015) (No. 14-70017) (cited in Pet. Br. App. 5a), the parties filed over 100 pages of opening briefing, the petitioner was granted leave to file a reply brief, and a Fifth Circuit panel heard oral argument before denying the request for a COA.[12] The court followed a similar pattern in *Trottie v. Stephens*, 720 F.3d 231 (5th Cir. 2013) (No. 11-70028) (cited in Pet. Br. App. 17a).[13] And in *Sells v. Stephens*, 536 F. App'x 483 (5th Cir. 2013) (No. 12-70028) (cited in Pet. Br. App. 15a), the court received nearly 200 pages of initial briefing,

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[11] The Fifth Circuit also has, in a number of cases, denied habeas relief after granting a COA. *E.g.*, *Gates v. Davis*, No. 15-70024, 2016 WL 2909193 (5th Cir. May 18, 2016) (per curiam) (COA grant); *Gates v. Davis*, No. 15-70024 (5th Cir. Aug. 24, 2016) (affirming denial of relief); *Villanueva v. Stephens*, 555 F App'x 300 (5th Cir. 2014) (COA grant) (per curiam); *Villanueva v. Stephens*, 619 F App'x 269 (5th Cir. 2015) (per curiam) (affirming denial of relief); *Wood v. Stephens*, 540 F App'x 422 (5th Cir. 2013) (per curiam) (COA grant); *Wood v. Stephens*, 619 F App'x 304 (5th Cir. 2015) (per curiam) (affirming denial of relief); *Maldonado v. Thaler*, 389 F. App'x 399 (5th Cir. 2010) (per curiam) (COA grant); *Maldonado v. Thaler*, 625 F.3d 229 (5th Cir. 2010) (affirming denial of relief).

[12] *See* Doc. 00512725761 (5th Cir. Aug. 7, 2014) (COA application); Doc. 00512823602 (5th Cir. Nov. 3, 2014) (response); Doc. 00512890244 (5th Cir. Jan. 6, 2015) (order granting leave to file reply); Doc. 00512890250 (5th Cir. Jan. 6, 2015) (reply).

[13] *See* Doc. 00511881267 (5th Cir. May 31, 2012) (COA application); Doc. 00511950674 (5th Cir. Aug. 8, 2012) (response); Doc. 00511957466 (5th Cir. Aug. 15, 2012) (order granting leave to file reply); Doc. 00511976208 (5th Cir. Sept. 5, 2012) (reply).

permitted a reply brief, considered the parties' supplemental authorities, invited supplemental letter briefs from both sides, and heard oral argument before denying the request for a COA.[14] The Fifth Circuit's practice thus provides substantial process to capital COA applicants.

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[14] *See* Doc. 00512104116 (5th Cir. Dec. 26, 2012) (COA application); Doc. 00512176140 (5th Cir. Mar. 15, 2013) (response); Doc. 00512204732 (5th Cir. Apr. 10, 2013) (order granting leave to file reply); Doc. 00512204788 (5th Cir. Apr. 10, 2013) (reply); Doc. 00512258974 (5th Cir. May 31, 2013) (petitioner's Federal Rule of Appellate Procedure 28(j) letter); Doc. 00512259688 (5th Cir. June 3, 2013) (respondent's Federal Rule of Appellate Procedure 28(j) letter); Doc. 00512270847 (5th Cir. June 12, 2013) (order granting leave to file supplemental letter brief); Doc. 0512284137 (5th Cir. June 22, 2013) (petitioner's letter brief); Doc. 00512288899 (5th Cir. June 26, 2013) (respondent's letter brief).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DUANE EDWARD BUCK,

Petitioner,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I. Introduction

This is the rare habeas case for which relief under Federal Rule of Civil Procedure 60(b)(6) is appropriate. Although the state ordinarily has a strong interest in the finality of criminal judgments, Texas acknowledged that when, as here, a death sentence is corrupted by "expert testimony" that the defendant is more likely to commit crimes of violence because of his race, its finality interest does not apply. For that reason, Texas conceded error in *Saldaño v. Texas* and then publicly declared it would not object to new sentencing hearings in six additional cases—including Mr. Buck's—that involved expert race-as-criminal-violence testimony. It kept its promise in five of those cases, but reneged on its promise to Mr. Buck.

Texas's arguments do not change the fact that this case is extraordinary, or that the lower courts' denial of relief was wrong, or at least debatable. Mr. Buck is entitled to a Certificate of Appealability (COA).

II. This Court Cannot Have Confidence in Duane Buck's Sentence of Death.

Texas now concedes that "the introduction of race into [Mr. Buck's] own capital-punishment proceedings by [Mr. Buck's] own trial counsel was at least debatably deficient performance." Red Br. 1. Yet, Texas continues to advance the untenable argument that Mr. Buck cannot meet *Strickland*'s prejudice prong, and indeed that no reasonable jurist could disagree. According to Texas, Dr. Quijano's repeated statements that Mr. Buck's race meant he was more likely to commit acts of criminal violence (a) played only a "very limited role" at sentencing, and (b) are

of no constitutional significance given the "overwhelming" aggravating evidence. Red Br. 23-33. Texas is wrong on both points.

A. Dr. Quijano's Testimony Was Uniquely Harmful.

Dr. Quijano's race-as-dangerousness opinion tainted Mr. Buck's sentencing proceeding with an "arbitrary, emotionally charged factor that has nothing to do with individual moral culpability." Red Br. 1 (citation omitted). The harm to Mr. Buck is clear: "Injection of a defendant's ethnicity into a trial as evidence of criminal behavior is self-evidently improper and prejudicial. . . ." *United States v. Cruz*, 981 F.2d 659, 664 (2d Cir. 1992). Indeed, courts have recognized for over a century that appeals to race bias create a *sui generis* risk that the jury will make its decision based on invidious considerations that have nothing to do with the competent evidence. *See* Blue Br. 36-38. Texas makes a number of arguments seeking to avoid this principle, but none are persuasive.

First, contrary to Texas's suggestion, Red Br. 29, the race-as-dangerousness opinion does not have to be repeated a certain number of times or occupy a specific percentage of transcript lines in order to be prejudicial. Given our nation's history, "one cannot unring the bell" or "destroy the virus that [is] spread" when jurors are urged to consider a criminal defendant's race as evidence in support of guilt or punishment. Blue Br. 33-34 (citations omitted). Indeed, in most of the cases cited by Mr. Buck on this issue, the court found prejudice based on just one or two racially-biased statements (some of which the jurors were instructed to disregard). *See id.* at 36-38.

Prejudice follows *a fortiori* here, where Dr. Quijano's assertions that Mr. Buck's race made him more likely to commit criminal acts of violence were presented to the jury on three separate occasions.

On direct examination, defense counsel elicited testimony by Dr. Quijano that Mr. Buck's "race" was one of the "the statistical factors we know to predict future dangerousness." JA 146a.

On cross-examination, the prosecutor had Dr. Quijano reaffirm that "the race factor, black, increases the future dangerousness for various complicated reasons." JA 170a.

And Dr. Quijano's report, which was submitted to the jury at defense counsel's request, stated that Mr. Buck's "**Race**. Black" meant there was an "Increased probability" he would "commit criminal acts of violence that would constitute a continuing threat to society." JA 18a, 19a (emphasis in original). During deliberations, the jury asked to review the "psychology reports," which included Dr. Quijano's. JA 209a.

Second, Texas stresses that it was the prosecution that made a direct racial appeal in the precedent cited in Mr. Buck's opening brief. Red Br. 31. But so did the prosecutor here. To be sure, the initial source of the constitutional error in this case was the failure of Mr. Buck's attorneys to "function[] as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). But one consequence of that error was that it opened the door for the prosecution to use Dr. Quijano's testimony to make a "direct plea[] . . . that the jury consider race or ethnicity as evidence of criminality." Red Br. 31.

Moreover, contrary to Texas's assertion, the prosecutor did not "merely review[] the entirety of Quijano's testimony without expressing either agreement or disagreement with Quijano's views." Red Br. 30. The prosecutor not only reiterated Dr. Quijano's race-as-dangerousness opinion, she suggested it was grounded in empirical research: "You have determined that . . . the race factor, black, increases the future dangerousness ***for various complicated reasons***; is that correct?" JA 170a (emphasis added). By contrast, the prosecutor sought to undermine Dr. Quijano's opinions that were helpful to Mr. Buck. *See, e.g.*, JA 169 (questions designed to undermine Mr. Buck's age as a factor decreasing the probability of future dangerousness); JA 170a (similar with respect to Mr. Buck's work history).

In sum, the jury in Mr. Buck's case heard testimony that "condemn[ed] [Black people] as a class" as predisposed to criminal violence, just as in the Jim Crow era case law cited in Mr. Buck's opening brief. *Allison v. State*, 248 S.W.2d 147, 148 (Tex. Crim. App. 1952). That the testimony was elicited by both the defense and the prosecution—and was presented as the purportedly professional opinion of a defense expert "appointed by Judge Collins . . . to do an evaluation on the defendant"—only exacerbates the harm. Blue Br. 30-31; *see Walbey v. Quarterman*, 309 F. App'x 795, 804 (5th Cir. 2009) (testimony by a defense expert supporting the prosecution's future dangerousness case was "highly prejudicial, particularly coming from a defense witness").

Third, it does not matter that Dr. Quijano also presented testimony favorable to Mr. Buck. Because a jury expects a defense expert to reach a conclusion favorable to

the defense, any testimony from such an expert that favors the prosecution is likely to stand out in jurors' minds. *See id.* at 803-04 (finding *Strickland* prejudice because, *inter alia*, testimony by a defense expert "did severe damage to Walbey's case," even though the expert's ultimate conclusion was that Walbey was not likely to be a future danger); *Walbey v. Quarterman*, 2008 WL 6841900, at *8-10 (S.D. Tex. Feb. 20, 2008) (district court's decision describing expert's testimony).

Furthermore, Texas overstates the favorable aspects of Dr. Quijano's testimony. Red Br. 29-30. On cross-examination, Dr. Quijano—to the prosecutor's apparent surprise—testified that there ***was*** a probability Mr. Buck would commit future acts of violence:

> Q: . . . I believe you testified . . . that you believed that the defendant if incarcerated . . . there would not be the probability about him being a continuing threat to society. I believe that was your opinion.
>
> A. No.
>
> Q. That was not your opinion?
>
> A. A decreased probability but there is a probability.
>
> . . .
>
> Q. Then there is a probability that he would be a continuing threat to society?

A. Yes.

MS. HUFFMAN: No other questions, Doctor...

JA 176a.

The prosecutor was thus able to argue in closing: "You heard from Dr. Quijano, who had a lot of experience in the Texas Department of Corrections, who told you that there was a probability that the man would commit future acts of violence." JA 198a.[1]

By contrast, Dr. Lawrence, another defense expert who had previously evaluated roughly 900 prisoners convicted of homicide, consistently testified that Mr. Buck was not likely to be a future danger. *See* Tr. 177, 182-86, 188-204, 205-06, *Buck v. Thaler*, No. 4:04-cv-03965 (S.D. Tex. June 24, 2005), ECF Nos. 5-115, pp. 34, 39-41; 5-116, pp. 2-3, 22-23; 5-116, pp. 5-21. As a result, all the prosecutor could say in closing about Dr. Lawrence was: "[t]he other gentleman, Dr. Lawrence, he told you that he couldn't make any guarantees." JA 199a.

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[1] Texas's argument that the prosecution's closing did not specifically refer to race, Red Br. 30, misses the point. In closing, the prosecutor expressly invoked Dr. Quijano's opinion that there was a probability Mr. Buck would be a future danger. That opinion was tainted by Dr. Quijano's race-as-dangerousness opinion. Although Texas suggests that Dr. Quijano's ultimate future dangerousness opinion was based solely on Mr. Buck's lack of remorse in the wake of the crimes, that suggestion is not supported by the Transcript. *Compare* Red Br. 30-31 *with* JA 175a-76a.

Fourth, Texas gets it backward when it asserts that Dr. Quijano's testimony was less harmful than the inflammatory racial rhetoric at issue in some of the case law cited by Mr. Buck. *See* Red Br. 31. Here, the prosecutor did not simply "draw the color line" by making a generalized appeal to racial prejudice, or use a coded phrase such as "burn, baby, burn" in the course of a question that the jury was instructed to disregard. *Id.* (citing cases). Instead, the prosecutor and the defense elicited testimony that "bore the imprimatur of an expert's opinion" and legitimized the uniquely pernicious stereotype that Black men are more likely to commit acts of criminal violence. *Vanderbilt v. Collins*, 994 F.2d 189, 199 (5th Cir. 1993).

This last point is especially significant because a jury finding of future dangerousness was a prerequisite for a death sentence here, and future dangerousness was the central disputed issue. Blue Br. 5-8. As this Court has recognized (in a case Texas does not even mention), a juror who "believes that blacks are violence prone . . . might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors" required for a death sentence; "[s]uch a juror might also be less favorably inclined toward petitioner's" mitigating evidence. *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion). Dr. Quijano repeatedly validated this false and uniquely prejudicial stereotype in Mr. Buck's case.

B. The Aggravation Does Not Alter the Prejudice Caused by Dr. Quijano's Testimony.

This Court has found *Strickland* prejudice even when the prosecution presented substantial evidence in aggravation. *See* Blue Br. 39-40 (discussing *Porter v.*

McCollum, 558 U.S. 30 (2009) (per curiam), and *Williams v. Taylor*, 529 U.S. 362 (2000)). Texas does not contend that this case is any more aggravated than *Porter* or *Williams*; and, indeed, Texas specifically "does not argue" that a brutal crime precludes a finding of prejudice. Red Br. 24.

Yet, at the same time, Texas insists that *Porter*, *Williams* and the other ineffective assistance of counsel cases cited in Mr. Buck's opening brief "have little bearing on this case" because they were premised on counsel's failure to investigate mitigation. Red Br. 24 & n. 6. That is a distinction without a difference. This Court's precedent is clear: errors by defense counsel that fundamentally skew the evidentiary picture presented to the capital sentencing jury can undermine confidence in a death sentence, even when a crime involves substantial aggravation. *See Porter*, 558 U.S. at 41-42; *Williams*, 529 U.S. at 398. That principle is applicable whether defense counsel fails to investigate and present mitigating evidence that would help their client (*i.e.*, the most common capital sentencing ineffectiveness claim), or defense counsel introduces uniquely harmful "evidence" that supports the state's case for death (*i.e.*, the extraordinary circumstances of Mr. Buck's ineffectiveness claim).

The case law cited by Texas, *see* Red Br. 25-26, does not hold otherwise. None of those cases involved an error by defense counsel that fundamentally skewed the evidentiary picture presented to the jury. *See, e.g., Wong v. Belmontes*, 558 U.S. 15, 22-27 (2009) (per curiam) (omitted mitigation was cumulative of trial evidence, or would have allowed the prosecution to introduce evidence of another murder in rebuttal); *Lenz v. Washington*, 444 F.3d 295, 303 (4th Cir. 2006) (petitioner, sentenced to death for a

prison killing, did not allege a "single fact that counsel or an expert failed to discover").

And, while Mr. Buck does not dispute that the "brutality of a crime" may be "probative of future dangerousness," Red Br. 24-25, context is critical. *Compare Martinez v. Quarterman*, 270 F. App'x 277, 286-87, 299 (5th Cir. 2008) (noting brutality of petitioner's double homicide as supportive of future dangerousness in a case where the defendant also engaged in repeated violent conduct in jail, including threatening an officer's family), *with Berry v. State*, 233 S.W.3d 847, 864 (Tex. Crim. App. 2007) (finding insufficient evidence of future dangerousness as a matter of law because—even though the defendant brutally murdered her infant child, left another infant child in a ditch, and lacked remorse—there was no evidence she was likely to be dangerous to anyone other than her own children, and a life sentence would ensure her incarceration throughout her remaining child-bearing years). In this case, Mr. Buck never demonstrated a propensity for violence outside of the context of a romantic relationship, and the undisputed record showed that he was nonviolent in prison.

Texas also suggests that case law "deal[ing] with improperly admitted expert testimony on future dangerousness" is more relevant here. Red Br. 24-25 n.6. But that precedent only confirms the error in Texas's "brutality trumps" argument. *Walbey*, 309 F. App'x at 804 (citing *Gardner v. Johnson*, 247 F.3d 551, 553 (5th Cir. 2001)). In *Satterwhite v. Texas*, 486 U.S. 249, 259 (1988), this Court found such improperly admitted testimony to be prejudicial notwithstanding at least as much evidence of future dangerousness as was present

here: Mr. Satterwhite had prior convictions for, *inter alia*, aggravated assault and armed robbery; he shot a relative in a separate incident; and another psychologist testified that Mr. Satterwhite was unable to feel guilt and "would be a continuing threat to society through acts of criminal violence." *Id.* Texas stresses the harmful nature of the expert's testimony in *Satterwhite*, *see* Red Br. 24 n.6, but, as discussed, Dr. Quijano's repeated assertions that Mr. Buck's race increased his probability of criminal violence were profoundly harmful.

Consistent with *Satterwhite*, the Fifth Circuit and Texas Court of Criminal Appeals have repeatedly found improperly admitted expert testimony, and other future dangerousness evidence, to be prejudicial even when the untainted evidence of future dangerousness was at least as strong as it was here. *See, e.g.*, *Gardner*, 247 F.3d at 554 (defendant picked up two fourteen-year-old hitchhikers, "stabbed the male numerous times and left him for dead, then took the female to a nearby lake where he stabbed her numerous times [and] hit her in the head with a rock . . . ."); *Vanderbilt*, 994 F.2d at 191-92 (defendant kidnapped and killed a sixteen-year-old, had previously abducted a woman at gunpoint and sexually assaulted her, and four police officers testified about his reputation for not being peaceful); *Thompson v. State*, 93 S.W.3d 16, 19-20, 28 & n.9 (Tex. Crim. App. 2001) (defendant shot and killed his ex-girlfriend and her male friend; threatened a deputy in a separate incident; and a cellmate reported to authorities that he was attempting to hire someone to kill a witness).

Texas also stresses that the combination of a brutal crime and evidence of a lack of remorse is "sufficient for a Texas jury to find that a capital defendant presents a

continuing threat to society." Red Br. 26. But *Strickland* is not a sufficiency-of-the-evidence test; the question here is not whether there "would not be enough left" to support the jury's death sentence absent Dr. Quijano's testimony. *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995) (discussing *Brady* materiality standard, and noting that standard is identical to *Strickland* prejudice). Instead, *Strickland* asks whether there is a "reasonable probability" at least one juror would have reached a different conclusion absent Dr. Quijano's repeated assertions that Mr. Buck's race increased his likelihood of committing future acts of criminal violence. 466 U.S. at 694; *see Wiggins v. Smith*, 539 U.S. 510, 537 (2003). And, while a "reasonable probability" requires a "substantial" likelihood of a different result, Red. Br. 33 (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011)), it "do[es] not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding." *Porter*, 558 U.S. at 44 (quoting *Strickland*, 466 U.S. at 693-94). Instead, *Strickland*'s prejudice prong asks whether counsel's error "deprive[d] the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687.

A defendant can be deprived of a fair sentencing hearing even if his crime involves both aggravated facts and lack of remorse evidence. Indeed, Texas juries have repeatedly answered "no" to the future dangerousness special issue—and imposed life sentences—in such cases. For instance, in *Garcia v. State*, 2010 WL 4053640, at *3-4 (Tex. Ct. App. 2010), the jury answered "no" to the future dangerousness special issue when: the defendant killed two taxi drivers on separate days by shooting them in the back of the head; a witness testified that the defendant "seemed excited about" having killed the victims; and a

fellow inmate testified that the defendant said he should have killed a witness to a bank robbery he committed, and that the defendant, referring to a prison guard, said: "What you do with a motherfucker like that is put three in the back of his fucking head."

Similarly, in *Saenz v. State*, 421 S.W.3d 725, 733 (2014), the jury answered "no" to the future dangerousness special issue when, over a course of a month, the defendant killed five dialysis patients by injecting their intravenous dialysis lines with bleach and poisoned three additional patients in the same manner.[2] Texas juries also answered "no" to the future dangerousness question in cases where: the defendant killed his ex-girlfriend's sister and mother, caused the miscarriage of his own child, and jail officials testified that he was verbally abusive and smuggled a razor blade into his cell;[3] and the defendant killed two girls, ages 2 and 6, in a drive-by shooting.[4]

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[2] *See also* Crimesider Staff, *Kimberly Saenz, ex-nurse convicted of bleach killings, sentenced to life in prison*, CBS News, April 2, 2012, http://www.cbsnews.com/news/kimberly-saenz-ex-nurse-convicted-of-bleach-killings-sentenced-to-life-in-prison/.

[3] Craig Kapitan, *Jury rejects death sentence*, My San Antonio, Oct. 23, 2012, http://www.mysanantonio.com/news/local_news/article/Jury-rejects-death-sentence-3972452.php.

[4] *See* Associated Press, *Corpus Christi Man Gets Life in Prison for Killing 2 Girls*, NBC Dallas Fort Worth News, Feb. 28, 2015, http://www.nbcdfw.com/news/local/Corpus-Christi-Man-Gets-Life-in-Prison-for-Killing-2-Girls-294495691.html; http://www.txcourts.gov/media/905882/Nueces-02_26_15-Jury-Charge-Sentencing-Brendan-Gaytan.pdf (jury charge).

All of these cases were as aggravated as Mr. Buck's case, if not more so. Indeed, while Texas stresses Mr. Buck's lack of remorse during and immediately after the crime, *see* Red Br. 27 (citing JA 71a, 89a, 118a, 133-35a), in both *Garcia* and *Saenz*, the defendant showed a lack of remorse well after the crime, including by committing additional murders.

Here, by contrast, the jury could have reasonably concluded that Mr. Buck's crying at trial indicated that he was remorseful once given an opportunity to reflect on his actions. Texas asserts that Mr. Buck's crying "could be viewed as fear of the consequences." Red Br. 27. But the prosecutors who saw Mr. Buck cry never suggested such an interpretation, and never challenged Dr. Quijano's testimony that such crying indicated remorse. JA 182a-83a. Texas cannot deny that at least one juror may well have found that Mr. Buck's crying indicated that he is remorseful. Indeed, the Texas Court of Criminal Appeals has found it was not harmless to exclude much less powerful remorse evidence (*i.e.*, a letter in which the defendant expressed sympathy for the victim's family while seeking to blame others for the crime), in a case where the defendant, a registered sex offender, kidnapped and killed a five-year-old girl. *See Renteria v. State*, 206 S.W.3d 689, 694, 698 (2006).[5]

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[5] Mr. Buck recognizes that Phyllis Taylor's statement that Mr. Buck sought and received her forgiveness is not technically part of the *Strickland* analysis. *See* Red Br. 27. Mr. Buck notes, however, that this is the kind of technical argument Texas said it would not raise in defending death sentences compromised by Dr. Quijano's race-as-dangerousness testimony.

Even assuming that the future dangerousness evidence here was sufficient, it was not overwhelming. Although Texas attempts to downplay the point, Red Br. 32, it cannot dispute that Mr. Buck functioned well in prison, and did not have the characteristics (*e.g.*, a gang affiliation) considered risk factors for prison violence. Blue Br. 42. Nor was there any evidence that Mr. Buck had ever been violent outside of the context of a romantic relationship with a woman.[6] And the undisputed evidence established that it was highly unlikely that he would develop such a relationship in prison. Blue Br. 41.

This Court need look no further than what actually happened at sentencing to reject Texas's assertion that "[o]n this record, it was manifest that [Mr. Buck] presented a future danger." Red Br. 24. The jury that heard all of the aggravating evidence now stressed by Texas was unable to make a quick decision. It deliberated for two days, and sent out four notes.

Although Texas insists that the length of the jury's deliberations does "not suggest a substantial likelihood" of a different result absent Dr. Quijano's race-as-dangerousness testimony, Red Br. 32, it never justifies that assertion. Nor could it. As this Court explained in *Parker v. Gladden*, 385 U.S. 363, 365 (1966), such lengthy jury deliberations "indicat[e] a difference among" the jurors and support a finding of prejudice. Moreover, while we cannot know why jurors requested the psychological

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[6] Contrary to Texas's suggestion, Red Br. 32, the circumstances of the instant crime, including Mr. Buck's shooting of his sister, were related to the breakdown of Mr. Buck's romantic relationship with Ms. Gardner. *See* Blue Br. 4.

reports, *see* Red Br. 33, we do know that, as the jury was struggling to determine whether Duane Buck was likely to be a future danger, they had before them Dr. Quijano's "expert" report stating that Mr. Buck's "**Race**. Black" meant an "[i]ncreased probability" he would "commit criminal acts of violence that would constitute a continuing threat to society." JA 18a, 19a.

It is difficult to imagine a death sentence less reliable than this one.

III. Mr. Buck's Case is Extraordinary Within the Meaning of Federal Rule of Civil Procedure 60(b)(6).

This is the rare habeas case for which relief under Rule 60(b)(6) is warranted. Blue Br. 47-54. Mr. Buck's trial counsel knowingly injected an explicit appeal to racial bias into Mr. Buck's capital sentencing hearing; this error undermined confidence in Mr. Buck's death sentence and in the criminal justice system overall; after conceding error in *Saldaño*, Texas publicly acknowledged that it had no finality interest in six additional death sentences, including Mr. Buck's, which were compromised by Dr. Quijano's race-as-criminal-violence opinion; Texas conceded constitutional error and waived procedural defenses in five of the cases, but reneged on its commitment to Mr. Buck; and this Court's intervening decisions in *Martinez* and *Trevino* allow for merits review of Mr. Buck's ineffectiveness claim, which was defaulted because of state habeas counsel's failure to raise it for three years. Blue Br. 18-20. These facts are patently extraordinary and amply demonstrate Mr. Buck's entitlement to a COA.

A. Trial Counsel's Knowing Introduction of Dr. Quijano's Explicit Appeal to Racial Bias Is Extraordinary.

As Texas acknowledges, "[r]ace is an arbitrary, emotionally charged factor that has nothing to do with individual moral culpability." Red Br. 1. Yet, Texas insists that trial counsel's introduction of an expert opinion that Mr. Buck's race ***supported a death sentence*** is not extraordinary within the meaning of Rule 60(b)(6) because counsel's error was not prejudicial. Red Br. 41. As detailed above, Texas is wrong: Dr. Quijano's opinion was uniquely harmful, and it is reasonably probable that at least one juror would have reached a different conclusion without it.

Moreover, trial counsel's introduction of Dr. Quijano's race-as-criminal-violence opinion not only prejudiced Mr. Buck's case, it also undermines "public confidence in the evenhanded administration of justice." *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015); *see also JEB v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) (race discrimination in the court system "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law"); Blue Br. 47-49.

Texas cannot dispute the extraordinariness of this harm because it was the very reason that Texas took the extraordinary step of publicly declaring that it had no finality interest in six death sentences, including Mr. Buck's, that were corrupted by Dr. Quijano's opinion. Texas explained: "it is inappropriate to allow race to be considered as a factor in our criminal justice system," and"[t]he people of Texas want and deserve a system that affords the same fairness to everyone." JA 213a.

B. It Is Extraordinary that Texas Recognized Its Ordinary Interest in Finality Does Not Apply to Mr. Buck's Death Sentence, But Arbitrarily Reversed Course and Pursued Mr. Buck's Execution.

Three years after Mr. Buck's trial, Texas publicly declared that its interest in the fairness of the criminal justice system outweighed its ordinary interest in the finality of six death sentences, including Mr. Buck's. Texas did so after a "thorough audit" revealed those cases to be "similar to that of Victor Hugo Saldano," a case where Texas conceded error in this Court because "testimony was offered by Dr. Quijano that race should be a factor for the jury to consider in making its determination about the sentence in a capital murder trial." JA 213a. Texas announced that it would waive its procedural defenses and allow new sentencing hearings in each of the six identified cases. *See* Blue Br. 11 & n.2. Texas sent letters to the relevant prosecutors and defense counsel advising them of its findings (JA 214a), and filed federal court pleadings fulfilling its promise in five of those cases. *See* Blue Br. 12 nn. 3-4. In other words, Texas itself recognized that this is the "rare instance[]" when the state's ordinary interest in the "finality of judgments" must yield. *O'Neal v. McAninch*, 513 U.S. 432, 447 (1995) (Thomas, J., dissenting). That is extraordinary.

Because Texas broke its promise to Mr. Buck, he is the only prisoner to face execution pursuant to a death sentence that Texas itself has declared to be illegitimate. This is more extraordinary still: it undermines confidence in the justice system; causes the public to lose confidence in the impartiality of prosecutors; and encourages a public

perception that the justice system is arbitrary. *See* Br. of Former Prosecutors as Amici Curiae in Supp. of Pet. 17-23.

The foregoing circumstances are not only extraordinary on their face, they "*justify[] relief from the judgment*," under Rule 60(b). Red Br. 44 (citations omitted). In analyzing whether extraordinary circumstances justify relief from judgment, key factors under this Court's precedent are "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988). All of those factors favor Mr. Buck.

And these circumstances are extraordinary regardless of whether or not Texas's commitment "'created legally enforceable rights,'" Red Br. 44 (quoting JA 260a), constituted an independent basis for relief, *id.* at 43, or involved detrimental reliance by Mr. Buck, *id.* at 44. The extraordinariness of Texas's conduct is simply not contingent upon the application of judicial estoppel principles. *Cf.* Red Br. 43-44. It is extraordinary because it shows that Texas recognized Mr. Buck's death sentence undermines public confidence in the rule of law, such that Texas's ordinary interest in finality does not apply.

Similarly, because Mr. Buck is now able to challenge his trial counsel's knowing introduction of Dr. Quijano's race-as-dangerousness opinion, Texas's conduct is extraordinary even though "[o]nly in Buck's case did defense counsel elicit the race-related testimony on direct examination." Red Br. 45 (quoting *Buck v. Thaler*,

132 S. Ct. 32, 34-35 (2011) (Alito J.)). As noted, Texas acknowledged that it has no interest in the finality of death sentences where "testimony was offered by Dr. Quijano that race should be a factor for the jury to consider in making its determination about the sentence in a capital murder trial." JA 213a. Thus, by its express terms, Texas's promise focused on the fact that improper race-as-dangerousness evidence was admitted in a death penalty trial, not on the identity of the party introducing it. Indeed, Dr. Quijano's opinion was even more harmful in Mr. Buck's case because it was first elicited by defense counsel and then capitalized on by the prosecutor. *See* p. 4, *supra*.

C. *Martinez* and *Trevino* Support a Finding that Mr. Buck's Case is Extraordinary.

When *Martinez* and *Trevino* are considered in combination with the other extraordinary facts and circumstances in Mr. Buck's case, they confirm Mr. Buck's entitlement to Rule 60(b)(6) relief. As this Court recognized in *Martinez*, a state's interest in finality is lessened when, as here, unreasonable errors by state habeas counsel prevent review of whether trial counsel fulfilled their "foundation[al]" role of "test[ing] the prosecution's case . . . while protecting the rights of the person charged." *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012); *see* Blue Br. 52, 56.

Texas contends that *Martinez* and *Trevino* do not support 60(b) relief because "the overwhelming aggravating evidence in this case foreclosed petitioner's ability to establish the prejudice element of his ineffective-assistance [of counsel] claim." Red Br. 41. As detailed above, this is false.

Texas also contends that "*Martinez* and *Trevino* do not apply retroactively to cases on collateral review." Red Br. 38 (citing, *inter alia*, *Teague v. Lane*, 489 U.S. 288, 299-316 (1989)). *Teague*, however, applies only to "new constitutional rules of criminal procedure," *id.* at 310, that apply to the trial – not collateral review – process. *Montgomery v. Louisiana*, 136 S. Ct. 718, 730 (2016) (*Teague* governs rules "designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.'") (citation omitted) (emphasis in original)). Because *Martinez* and *Trevino* are not constitutional rules governing criminal trials, *see, e.g.*, *Martinez*, 132 S. Ct. at 1319, *Teague*'s general rule against retroactivity does not apply. And, indeed, *Martinez* and *Trevino* were themselves habeas cases where the petitioner's conviction was already final.[7] *See also Neathery v. Stephens*, 134 S. Ct. 898 (2014) (vacating denial of a COA on a defaulted claim of trial counsel ineffectiveness, and remanding for further proceedings in light of *Trevino*); *Haynes v. Thaler*, 133 S. Ct. 2764 (2013) (same).

Texas has, in any event, waived its *Teague* argument by failing to raise it in the district court, the court of appeals, or, indeed, in its brief in opposition to certiorari. *See Schiro v. Farley*, 510 U.S. 222, 228-29 (1994).

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[7] *In re Paredes*, 587 F. App'x 805 (5th Cir. 2014) (per curiam), does not support Texas's position. *Paredes* explained that *Martinez* and *Trevino* did not announce a new retroactive, constitutional rule that would support a successive petition under 28 U.S.C. § 2244. *See id.* at 812. But that was only after the Court of Appeals recognized that *Martinez* and *Trevino* were properly (if, in that case, unsuccessfully) raised in a Rule 60(b) motion seeking to reopen an earlier habeas proceeding. *See id.* at 818-19; *see generally Coe v. Thurman*, 922 F.2d 528, 534 (9th Cir. 1991).

Texas also claims that "in this second Rule 60(b) motion, petitioner seeks to relitigate an ineffective assistance claim that he did not even raise in his first Rule 60(b)(6) motion," which "makes *Martinez* and *Trevino* even less relevant." Red Br. 36, 41-42. But, as Texas acknowledges, *see id.* at 38 n.8, when Mr. Buck litigated his first 60(b) motion, *Coleman v. Thompson*, 501 U.S. 722 (1991), stood as an "unqualified" bar to relief on Mr. Buck's defaulted claim of trial counsel ineffectiveness. *Trevino v. Thaler*, 133 S. Ct. 1911, 1917 (2013). Mr. Buck therefore pursued the viable, albeit ultimately unsuccessful, argument that Texas's "misleading remarks and omissions," *Buck*, 132 S. Ct. at 35 (Sotomayor, J. dissenting), constituted a fraud on the court. *See Buck v. Stephens*, 623 F. App'x 668, 670 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 2409 (2016). When *Martinez* and *Trevino* modified *Coleman* and, for the first time, afforded Mr. Buck an opportunity for federal review of his ineffectiveness claim, Mr. Buck filed the instant Rule 60(b)(6) motion. That Mr. Buck did not previously seek relief on a defaulted claim of trial counsel ineffectiveness reflects the state of the law in 2011, not a failure of diligence.

Martinez and *Trevino* support Rule 60(b) relief.

D. The District Court's Decision to Deny Rule 60(b) Relief Constitutes an Abuse of Discretion.

The District Court abused its discretion in denying Mr. Buck's motion for 60(b) relief because that court: (a) relied on an error of law; (b) failed to take into account key circumstances supporting relief; and (c) failed to adhere to the purpose of Rule 60(b).

First, although the Rule 60(b) standard is fact-intensive, *see* Red Br. 35, a court necessarily abuses its discretion when its application of that fact-intensive standard is premised on an error of law. *Highmark Inc. v. Allcare Health Mgmt. Sys. Inc.*, 134 S. Ct. 1744, 1748 n.2 (2014). That is precisely what happened here. The District Court recognized that Mr. Buck's trial counsel "recklessly exposed his client to the risks of racial prejudice and introduced testimony that was contrary to his client's interests," JA 364a, but concluded that this error did not support Rule 60(b) relief because Dr. Quijano's opinion had a "*de minimis*" impact on Mr. Buck's capital sentencing, JA 259a, 272a. The District Court's conclusion—which was premised on its review of the state court record and did not involve any findings of discrete, historical fact—was a legal error subject to *de novo* review. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (conducting *de novo* review of *Strickland* prejudice because state court had not reached the issue, without according any deference to decisions of lower federal courts) (citing *Wiggins*, 539 U.S. at 534). For the reasons stated above and in Mr. Buck's opening brief, Dr. Quijano's testimony undermines confidence in Mr. Buck's death sentence.

Second, the District Court failed to acknowledge that trial counsel's conduct in this case not only affected Mr. Buck, but also put "the very integrity of the courts [in] jeopard[y]." *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005). The integrity of the judicial system is a key factor in evaluating the propriety of relief under Rule 60(b)(6), *see Liljeberg*, 486 U.S. at 866, and the District Court's failure to consider it was likewise an abuse of discretion. *See, e.g., United States v. Taylor*, 487 U.S. 326, 342 (1988).

And, third, the District Court's failure to adhere to Rule 60(b)'s fundamental objective of providing a vehicle for vacating judgments where justice so requires constitutes an abuse of discretion. *See Liljeberg*, 486 U.S. at 864.

Mr. Buck respectfully submits that this Court should find the District Court abused its discretion in denying relief under Rule 60(b)(6). At a minimum, reasonable jurists would conclude that the District Court's decision is debatable, and a COA is required.

CONCLUSION

No constitutional principle is more fundamental than the rule that a defendant's race must play no role in a criminal trial. This Court has therefore been united in its "unceasing efforts to eradicate racial prejudice from our criminal justice system," when confronted with direct evidence of race bias in an individual case. *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (internal citation omitted). Allowing Mr. Buck to be executed pursuant to a capital sentencing proceeding where an expert repeatedly stated that he is more likely to commit future acts of criminal violence because he is Black would make a mockery of that commitment. A COA should issue.

Respectfully submitted,

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In the Supreme Court of the United States

DUANE EDWARD BUCK, PETITIONER
v.
LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF PETITIONER

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Petitioner.

Amicus has filed briefs with the Court on race issues, as in *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198, 2016 U.S. LEXIS 4059 (June 23, 2016), and on life-and-death-related issues, as in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2016 U.S. LEXIS 4063 (June 27, 2016). In the instant case, race issues and life/death issues meet each other head-on, so Amicus feels he may have something to contribute to the conversation, before the Court makes a horrible mistake and lets an American be killed by the State just because he is black.

SUMMARY OF ARGUMENT

While it was never right to kill somebody because he is black: to do so in 2016, decades after the 1960's Civil Rights Movement, is especially perverse.

Buck v. Bell, 274 U.S. 200 (1927), another case beginning with "Buck", has symbolic resonance with the tainted case against Duane Buck; and it should one day be overturned, with its embrace of "hereditary pollution" that resembles the race prejudice against Buck.

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[1] No party or its counsel wrote or helped write this brief, or gave money intended to fund its writing or submission, *see* S. Ct. R. 37 Blanket permission to write briefs is filed with the Court.

Symbolism and expressive harm are indeed important here, as in the race- and expressive-harm case of *Bush v. Vera*, 517 U.S. 952 (1996).

The Court and some of its past Members, from the beginning, have often shown great disregard for racial equality and fairness, which sad tradition of contempt should be reversed.

As a hypothetical comparison, we may imagine how the public and courts would and should react if Americans who happened to be of certain other backgrounds besides African-American, were punished *because* of those backgrounds.

America's ability to criticize unjust executions in other countries may be crippled if the Court allows Buck to be executed for being black.

Some very learned persons remind us that maybe the death penalty should be found unconstitutional, period, except in the case of absolute, self-defending necessity.

The sagas of Robert Alton Harris and Rodney King show that the death penalty may be fruitless, or even counterproductive, in discouraging crime and murder.

Race-selective and gender-selective abortion—especially considering the "adult abortion" looming for Petitioner because he is black—tend to be condemned by the same logic supporting Petitioner in this case.

The whole is at least the sum of its parts, and maybe more, in regard to the various factors which

add up to show that Petitioner's case is truly extraordinary and worthy of his request for relief.

The dissenting Justices in *Fisher*, *supra*, might possibly imagine a special duty to reverse the lower courts here, since those Justices felt that judging someone by his race is such a terrible thing.

Considering African Americans to be inherently criminal is a vile illusion which continues today, decades after Duane Buck's initial trial. It must end.

The Holocaust, lynching, and other lessons, real-life or literary, remind us that we must never let race be an excuse to kill anyone in America, or elsewhere, again.

ARGUMENT

I. AMERICA SHOULD HAVE LEARNED BY NOW, NOT TO KILL PEOPLE BECAUSE THEY'RE BLACK

> My conscience won't let me go shoot . . . some darker people [in Vietnam] for big powerful America. . . . They never called me n[ ]ger[.]

Muhammad Ali, *in* Ilias Khidr, *No Viet Cong. Called Me N[ ]ger* (brackets not in original), YouTube, https://www.youtube.com/watch?v=vd9aIamXjQI, Nov. 11, 2014. (The quote is more commonly rendered as, "No Vietcong ever called me n--ger.") This punchy observation, *supra*, from one of America's greatest athletes (recently deceased, RIP) offers, in six memorable words, extra reason to be

suspicious of the State of Texas' desire to kill petitioner Duane Edward Buck because, or even partially because, he is black. The black heavyweight boxer and conscientious objector Ali was hesitant to fight in the Vietnam War, for reasons including the pervasive racism he and other Afro-Americans had to deal at with home. Why fight Ho Chi Minh, many black Americans reasoned, when he wasn't the one burning a cross on their lawn or making them drink at a segregated water fountain?

And here, in 2016, not 1966 during the Vietnam War and the Civil Rights Movement under Martin Luther King and others, Petitioner faces death because . . he is black. Is this "equal justice under law"? Not so much.

In fact, the madness of inflicting death on Duane Buck brings up another Buck, that is, Carrie Buck in the infamous case of *Buck v. Bell*, *supra* at 1, which we now briefly discuss.

II. THE COURT SHOULD OVERRULE *BUCK V. BELL*, IN LINE WITH PREVENTING OTHER ABSURDITIES SUCH AS KILLING BLACKS FOR THEIR BLACKNESS

Symbolism is important, and if this contest of Duane Buck versus Lorie Davis for his very life is resolved against him and his skin color, people may be comparing that evil result to *Buck v. Bell* for ages. —In clarifying its jurisprudence, the Court should always be on the lookout for absurdities, since, as Voltaire noted, "Those who believe absurdities will commit atrocities." (*Questions sur les miracles* (1765)) And the absurdity, the very idea that someone could ever be sterilized against their will,

as in *Buck v. Bell*, flies in the face of the reproductive freedom defended in *Hellerstedt*, *supra* at 1.

Here is some of *Buck v. Bell*'s absurdity:

> It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U. S. 11. Three generations of imbeciles are enough.

Id. at 207 (Holmes, J.). Amicus has long wondered why Oliver Wendell Holmes, Jr., has maintained a stellar reputation over the decades, despite his Hitleresque opinion in *Buck v. Bell*. This Court should correct not only the errors of the lower courts in the instant case, but, at some point, also correct Holmes' errors and overturn *Buck v. Bell*. (If the Court wants to rename the Holmes Garden after the suffering victim Carrie Buck, they will not find Amicus complaining about that, either.)

Indeed, Holmes' language *supra* about "degenerate", "unfit . kind", and "generations of imbeciles" has the same stench as the "blackness-is-bad" idea of hereditary worthlessness and vice that we find in the instant case. Holmes' attitude was bad enough that it even inspired the Nazis in their depredations, *see* Wikipedia, *Buck v. Bell*,

https://en.wikipedia.org/wiki/Buck_v._Bell (as of 6:28 GMT, July 26, 2016). Dr. Quijano's wild mouthings about "blacks tending towards crime" remind us of Dr. Josef Mengele and the pseudo-scientific claptrap against Jews or others that he spouted at Frankfurt's infamous "Insitut für Erbbiologie und Rassenhygiene" (Institute for Hereditary Biology and Race Hygiene), or at the death camps, under the Third Reich.

Hitler was not fond of blacks; as the 2016 Summer Olympics come up, we remember how he treated black American champion Jesse Owens. The Court should not decide the instant case in a way that would please the ghost of Hitler.

III. SYMBOLISM, EXPRESSIVE HARM, BUCK, AND THE FRAUGHT CURRENT RACIAL SITUATION IN THE NATION

There is other, relevant symbolism in this case too. And symbolism is not a nullity: offensive symbolism can hurt, since words, not only sticks and stones, can hurt, especially if the State is wielding the words. *See, e.g., Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), which, *see id.*, rightly allowed Texas to exclude the hated Confederate flag from State-issued license plates. *See also, e.g., Bush v. Vera*, *supra* at 2 (expressive harm from racially-charged statute establishing a strangely-shaped voting district).

Walker, *supra*, reminds us that Texans are not inherently racist themselves—since they were decent enough to ban a racist license plate—, and that Texas is a great State. However, "even Homer

nods", and in the instant case, Texas is not being sensitive enough as to how Buck's blackness is being held against him, to the point of death.

For all we know, maybe even his name, "Buck", is being held against him, subconsciously. Whether it is or not, "Buck" has a horrible symbolism in our Nation's history, *see, e.g.*, Lingomash, *Slang meaning of Buck/Buck N[ ]ger*, 2016, http://lingomash.com/slang-meanings/59257/slang-meaning-of-buck-buck-nigger,

> Buck/Buck N[ ]ger means: This word has been used since the 17th century to refer to a male Negro [sic] no matter whether slave or not.
>
> Meaning of BUCK
> BUCK means: Buck is American derogatory slang for a young male Indian or Negro. [sic]

Id. (brackets not in original) For the Court to treat Duane Buck as a "Buck", *id.*, would be a spectacularly bad idea.

This is especially so considering the fraught racial climate in this country, with five police officers being murdered in Dallas (RIP) at a Black Lives Matter rally recently, and various black victims (RIP) of some police officers who were not living up to their high and noble calling. If the Court wants to ignore the bad omens *supra*, such as Buck's very name being usable as a racial slur against him, and decides he should die because of his color: that may help this Nation descend into an even more hellish

maelstrom of racial tension and death than before. It would be advisable to avoid this, surely.

IV. THE SUPREME COURT HAS A LOT TO ANSWER FOR IN TERMS OF PREJUDICE AGAINST AFRICAN AMERICANS

And, not even mentioning *Dred Scott v. Sandford*, 60 U.S. 393 (1857), or *Plessy v. Ferguson*, 163 U.S. 537 (1896), for the moment: the Court's Members themselves have much else to answer for in terms of the way they have treated race. For example, the "Great Chief Justice" was not so great at showing justice in his own life: he was a slaveowner, *see* Wikipedia, *John Marshall*, https://en.wikipedia.org/wiki/John_Marshall (as of 22:43 GMT, Aug. 3, 2016). Although Marshall was, *see id.*, a leader in the movement to send slaves back to Africa (Liberia), perhaps considered "humane" for the time: still,

> In 1825, as Chief Justice, Marshall wrote an opinion in the case of the captured slave ship *Antelope*, in which he acknowledged that slavery was against natural law, but upheld the continued enslavement of approximately 1/3 of the ship's cargo (although the remainder were to be sent to Liberia). In his last will and testament, Marshall gave his elderly manservant the choice either of freedom and travel to Liberia, or continued enslavement under his choice of Marshall's children.

Id. (citations omitted) The latter incident, giving the "option" between either Liberia or the Hobson's choice of letting the slave choose which child of Marshall he wanted to be enslaved by (!!), seems mildly unimaginative; how about just plain freedom, but somewhere in the United States? or free passage to the place of the slave's choice, such as England? And why didn't Marshall just free the slave before Marshall died? The slave might have liked that.

Marshall is widely admired, and rightly; but on race issues, John Marshall was no Thurgood Marshall, so to speak. (And re the names of Justices, Amicus notes that there were Justices named Black, Blackmun, or White: but, to Amicus' knowledge, nobody ever used those *names* to kill a Justice—including Hugo Black—, whereas Duane Buck is being killed *because he is **Black***.)

As well, Oliver Wendell Holmes, Jr. (visiting him again) was not above using the "n-word", *see* Thomas D. Russell, *Oliver Wendell Holmes to Emily Hallowell, 16 November 1862, Mark De Wolfe Howe, ed. Touched With Fire; Civil War Letters and Diary of Oliver Wendell Holmes, Jr., 1861-1864 (Cambridge: Harvard University Press, 1946).*, House of Russell, "American Legal History — Russell", *last modified* Nov. 18, 2009, http://www.houseofrussell.com/legalhistory/alh/docs/holmesletter.html, where Holmes spews, "At dark (rainy) struck a n[ ]ger hut, but no road, & here we are", *id.* (brackets not in original) He could, as a man of his time, have said something slightly less offensive (if still offensive), such as "hut of our dusky brethren from far Afric's sunny clime", but did not, instead

choosing to use the "n-word" The more shame to him, and to any institution associated with him.

The late Justice Antonin Gregory Scalia (RIP), who is dearly missed even by those who didn't always agree with him, nevertheless sometimes said things that could be considered less than sensitive:

> JUSTICE SCALIA: I'm just not impressed by the fact that -- that the University of Texas may have fewer. Maybe it ought to have fewer. And maybe some -- you know, when you take more, the number of blacks, really competent blacks admitted to lesser schools, turns out to be less. And -- and I -- I don't think it -- it -- it stands to reason that it's a good thing for the University of Texas to admit as many blacks as possible. I just don't think --

Fisher, *supra* at 1, Tr. of Oral Arg. at 67-68 (Dec. 9, 2015), *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-981_onjq.pdf. But those last four words, *id.* at 68, may be precisely the problem: that, literally, Scalia "just didn't think" when he said what he said, and thereby caused needless pain.

But what Scalia said is not as bad as what Dr. Quijano said. If we took Quijano's deranged opinions seriously, that would be reason to get rid of Justice Clarence Thomas from the Court, since by Quijano's reckoning, Thomas might "commit some crime" in his position, just because of his racial background.

But Thomas should stay, Quijano is wrong, and Duane Buck should receive relief from this Court.

V. A HYPOTHETICAL: IMAGINE MEMBERS OF OTHER RACES PUNISHED BECAUSE OF THEIR RACE

If any readers somehow do not understand yet how bad it would be, and look, for the Court to deny Petitioner relief: how much would the Court, or America, tolerate it if, say, an Italian or Jewish or Chinese person were targeted similarly?

We cherish Italian Americans—some of whom are or have been on the Court—, but some occasional Italians have coincidentally been in the Mafia or other organized crime entities, and have often been unjustly stereotyped as such. So if there were Gino Calabresi, a sinister-looking Connecticut gangster who coincidentally happened to be Italian, would it be tolerated if he were convicted of a crime, or had his sentence increased, on the racist theory that "Italians tend to commit organized crime"? One suspects not.

Or, while we cherish Jewish Americans—some of whom are or have been on the Court—, some occasional Jewish persons have coincidentally been committed financial fraud or bank-related criminal activity. and have often been unjustly stereotyped as such. So if there were Marnie Badoff, a dishonest banker who coincidentally happened to be Jewish; would it be tolerated if she were convicted of crimes, or had her sentence increased, on the racist theory that "Jews tend to commit financial crimes"? That

would probably not tickle public opinion in a good way.

Similar examples abound. If a Chinese-American, Charlie Chang, were coincidentally an opium dealer, should a ludicrous "Chinese tend to deal opium" theory be used to punish him or increase his punishment? That would be a pipe dream unworthy of any civilized justice system.

So if the hypothetical ethnics mentioned *supra* should not be treated as if their skin is a sin, or as if their race makes them reprobates, neither should petitioner Buck be so mistreated.

VI. DENYING DUANE BUCK JUSTICE MAY HURT AMERICA'S CREDIBILITY IN CRITICIZING UNJUST EXECUTIONS IN OTHER COUNTRIES

Speaking of multiple ethnic groups and nationalities: America's foreign policy is also implicated by the instant case. —Foreign nations sometimes criticize America's applications of the death penalty, but sometimes our Nation criticizes abuses of the death penalty elsewhere. *See, e.g.*, Tracy McVeigh & Martin Chulov, *US warns Saudi Arabia's execution of prominent cleric risks inflaming sectarian tensions*, The Guardian (London), Jan. 3, 2016, 6:25 a.m., https://www.theguardian.com/world/2016/jan/02/suadi-arabia-cleric-execution-unrest-predicted-shia-areas (U.S. State Department questions Saudi killing of Shiite cleric Nimr al-Nimr).

But if the Court and the Nation allow someone to be executed because of ""evidence"" that being Black predisposes you towards depravity, what credibility will America have when asking other nations to refrain from executing people? That might be a literal example of "the pot calling the kettle black"; and other nations will feel we have no credibility in criticizing them about death-penalty issues, since we cannot even fairly impose the death penalty ourselves. The Court should not needlessly allow America to be mocked and lose credibility in foreign affairs.

VII. THE COURT SHOULD CONSIDER ABOLISHING THE DEATH PENALTY, PERIOD, EXCEPT FOR CASES OF *PER SE* OR *DE FACTO* SELF-DEFENSE BY THE STATE

While we are discussing the death penalty re Buck, though, one might as well discuss the death penalty in general. One hears there is a movement on the Court and elsewhere to dispense with the death penalty, and this is likely a good thing. One key problem with the death penalty is its irreversibility: if an innocent person is somehow killed, say, because he was deliberately framed by some hoodlums, or because an inept DNA technician made a false identification of him as being the culprit in a murder, it is difficult to bring the person back to life.

There are many other problems with the death penalty as well, so that some thoughtful minds have urged abolishing it except in cases of dire need:

> [Re] the death penalty[,] there is a growing tendency, both in the Church and in civil society, to demand that it be applied in a very limited way or even that it be abolished completely.
>
> It is clear that, for these purposes [public order, safety, rehabilitation] to be achieved, the nature and extent of the punishment must be carefully evaluated and decided upon, and ought not go to the extreme of executing the offender except in cases of absolute necessity: in other words, when it would not be possible otherwise to defend society. Today however, as a result of steady improvements in the organization of the penal system, such cases are very rare, if not practically non-existent.

St. Pope John Paul II, *Evangelium Vitae* § 56 (1995), *available at* http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html. In other words, *see id.*, the death penalty would be basically limited to unavoidable self-defense. But killing Duane Buck does not seem to meet that criterion.

See also another John Paul, i.e., a John Paul Stevens well-known to the Court,

> In 2008, two years before he announced his retirement, Justice Stevens said that he now believed

> the death penalty to be unconstitutional.
>
> . .
>
> In a detailed, candid and critical essay[, Stevens] wrote that personnel changes on the court, coupled with "regrettable judicial activism," had created a system of capital punishment that is shot through with racism, skewed toward conviction, infected with politics and tinged with hysteria.

Adam Liptak, *Ex-Justice Criticizes Death Penalty*, N.Y. Times, Nov. 27, 2010, http://www.nytimes.com/2010/11/28/us/28memo.html?_r=0.

The two John Pauls *supra* speak some real wisdom. When maybe the whole idea of the death penalty (except in extreme need) is becoming rickety and unsupportable, it would be strange for the Court to buck this wholesome, lifesaving trend and accede to someone not just being killed by the State, but killed because he is black.

VIII. THE DEATH PENALTY MAY ACTUALLY BE COUNTERPRODUCTIVE: ROBERT ALTON HARRIS AND RODNEY KING

As noted *supra* at 7-8, letting Buck die could cause horrible racially-tinged violence in this country. More generally, the violence of the death penalty can be infectious in any case. —Amicus has wondered for some decades about whether the execution of Robert Alton Harris in California in 1992 may have helped cause the Rodney King riots a little while later and thus produce a negative result,

instead of the supposed "positive result" that death-penalty advocates claim that executions produce, e.g., dissuading people from committing murder.

Amicus, a Californian, remembers viewing the various spectacles *supra* and *infra* on television or in person that April long ago:

> Harris was executed on April 21, 1992, in the gas chamber at San Quentin State Prison—the first execution in California in 25 years.
>
> . . .
>
> Harris' execution is specifically remembered for his peculiar choice of final words (recorded by Warden Daniel Vasquez): "You can be a king or a street sweeper, but everybody dances with the grim reaper[.]"

Wikipedia, *Robert Alton Harris*, https://en.wikipedia.org/wiki/Robert_Alton_Harris (as of 12:41 GMT, June 21, 2016). So after a civilized respite of a quarter-century from the State of California killing people, the killing machine started up again, *see id.* Is it coincidental that eight days later, when there was a huge miscarriage of justice, i.e., when a jury refused to convict four police officers who beat Rodney King, that there was a massive riot, and scores of killings, in Los Angeles and also riots elsewhere? Amicus wonders.

In any case, Harris' execution certainly didn't seem to *deter* the Los Angeles rioters from killing people; maybe it even encouraged them to "rage against the machine" of a State they saw as unjust.

So, justice for Rodney King, Duane Buck, and everyone else is not to be ignored or treated cavalierly. We all—unless the "Rapture" or such occurs—have to meet the "grim reaper", as Robert Alton Harris noted, *id.* But to have the State itself play the Grim Reaper, and especially using race as a reason to kill, is extremely questionable by civilized standards, especially if the death penalty can't even achieve its supposed "positive" goals.

IX. A QUICK NOTE ON RACE- AND GENDER-SELECTIVE ABORTION

Speaking of inability to achieve goals: Amicus shall quickly note that while abortion rights are supposedly in the interest of women's autonomy and dignity, race-selective and gender-selective abortions impugn the autonomy and dignity of preborn persons who are killed precisely because of their race or gender. (Thus, race- or gender-selective abortions do not really achieve goals of autonomy or dignity.) If, as Amicus argues, Buck's color shouldn't be held against him to the point of death, it makes sense that in the womb, race or gender (or other qualities) shouldn't be allowed to be the cause of deaths either.

One could make broader assertions, e.g., that those who are against the death penalty should also be against abortion, and vice versa. (There are things for both doctrinaire Democrats and doctrinaire Republicans to get irritated about there.) But for now, Amicus shall just make some brief comments on *Hellerstedt*, *supra* at 1: while the Court found that the laws under discussion there did not promote women's health, still, Amicus wonders if more evidence could have been sought, or if some

beneficial parts of the laws in question could have been severed off and saved, as aptly noted by the dissent of Justice Samuel Alito joined by Chief Justice John Roberts and Justice Clarence Thomas, *see id.*, 2016 U.S. LEXIS 4063 at, e.g., **95, **113-**118,**150-**160. This might have taken more work by the Court; but if we really value the lives and health of women and others, it might have been worth it. Similarly, it may take some time and thought to pick carefully through the procedural brambles in the instant case and see that Buck should be given the requested relief from the "adult abortion" that Texas wants to perform on him, but it is worth it to do so.

X. PETITIONER'S COUNSEL HAS ABLY SHOWN REASON TO GIVE BUCK RELIEF: "THE WHOLE IS AT LEAST THE SUM OF ITS PARTS" RE CRUCIAL FACTORS, ETC.

Fortunately, Amicus does not need to explain the "procedural brambles" of the instant case too much, since Petitioner's able counsel has already done so, *see* Merits Br. for Pet'r (July 28, 2016) *passim*. Truly, this case is not just "exceptional", but even bizarre (racism; broken promises; spectacular incompetence by defense counsel; aberrancy of Fifth Circuit procedures compared to those of the Fourth and Eleventh Circuits; etc.), well justifying the issuance of a Certificate of Appealability.

In particular, re the District Court failing to do a holistic analysis, *see id.* at 54-55, one could say that that Court failed to realize that a whole is at least the sum of its parts, and maybe more. To take a bunch of separate factors and say they're each

individually insufficient, fails to consider the gestalt of the whole, or even to add the factors together, which is common sense.

Imagine if someone said, "Since one sole Member of the Supreme Court cannot issue a majority Opinion of the Court, the Court as a whole cannot do so, since no individual Justice can do so." But that is pure applesauce, as Justice Scalia used to say. When you add up members of the Court, a majority of them, when banded together, are allowed to issue a majority opinion, Amicus believes. Similarly, even if somehow no one factor in Buck's case proves extraordinary circumstances, a bundle of all, or even some, of the factors, may prove that the circumstances are extraordinary indeed.

XI. THE *FISHER* DISSENT SHOULD BE ESPECIALLY WARY OF HOLDING BUCK'S RACE AGAINST HIM

One "extraordinary" feature of the dissent in *Fisher v. Univ. of Texas at Austin* last June, written by Justice Alito and joined by the Chief Justice and Justice Thomas, was the concern professed for unjust racial discrimination and the misuse of stereotypes. E.g., "Even though UT has never provided any coherent explanation for its asserted need to discriminate on the basis of race", 2016 U.S. LEXIS 4059 at **115-**116; "In addition to relying on stereotypes, UT's argument that it needs racial preferences to admit privileged minorities turns the concept of affirmative action on its head", *id.* at **85. Amicus is pleased to see such pronounced distaste for discrimination and stereotyping.

That being so, it may look quite appropriate for the *Fisher* dissent to be in the forefront of support for Petitioner in the instant case. About the worst form of racial prejudice, or "discriminat[ion] on the basis of race" or "relying on stereotypes", *id.* at **116, **85, imaginable is to kill somebody because of his race. Conversely, if the *Fisher* dissenters were to allow Buck's execution because he is black (whether any forthcoming words from the Court or its Members say that literally or not), that would seem to contradict what they said in *Fisher*. A word to the wise, so to speak.

(By the way, though Amicus agrees with the Court majority, not the dissent, in *Fisher*, the dissent has some laudable points, e.g., concern about the noxious influence of "alumni child" or "legacy" advantages, *see id.* at **107-**109, and Amicus wishes to credit them for that. Those advantages give undeserved credit to privileged applicants because of their heredity, just as, conversely, Buck is being slated for death because of his inherited background, about which he could do nothing.)

XII. STATE STEREOTYPING OF BLACKS AS VIOLENT IS NOT SOME GHOST FROM THE PAST, BUT CONTINUES RIGHT NOW

By the way, the malign spirit of Buck's upcoming potential death-by-stereotype, based on Quijano's absurd testimony back in the 1990's, is not some isolated incident from the previous millennium; recently in Austin, Texas—where the lessons from *Fisher* about the joy of racial diversity have apparently not been learned yet—, we see this terrifying incident:

> A newly released video . . . shows a black woman being slammed to the ground and arrested by police during a traffic stop. In the police car, the woman and Patrick Spradlin, one of the police officers, has [sic] a conversation about racism. 'Let me ask you this, why are so many people afraid of black people?' he says, 'I can give you a really good idea of why it might be that way: violent tendencies'[.]

AP, *Austin police officer: black people have 'violent tendencies' – video*, The Guardian (London), July 22, 2016, 9:26 p.m., https://www.theguardian.com/us-news/video/2016/jul/22/austin-police-black-people-violent-tendencies. So Duane Buck's case is not from a world that is gone with the wind; the disease of racism continues as we speak, and the Court should help cure the disease.

If the Court fails to do so, the consequences could be unspeakable.

* * *

> When human lives are endangered, when human dignity is in jeopardy[, w]herever men or women are persecuted because of their race, religion, or political views, that place must – at that moment – become the center of the universe.

Elie Wiesel, *Elie Wiesel Acceptance Speech*, Nobelprize.org (Dec. 10, 1986), *available at*

https://www.nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-acceptance_en.html.

Elie Wiesel (RIP) was sensitized to the horror of prejudice, due to his experience with the stench of the crematoria at Auschwitz. But African Americans have had their unwanted crematoria too, if not as formalized and mechanized as those of the Third Reich, as we see in this image of a century ago:

Fred Gildersleeve, *File:Lynching of Jesse Washington, 1916 (cropped).jpg* (a.k.a. "*A photograph of the lynching of Jesse Washington in progress*"), May 15, 1916, *available at* https://commons.wikimedia.org/w/index.php?curid=21705499 (as of 7:28 GMT, Sept. 28, 2012).

Buck's life is "endangered [and] persecuted because of [his] race", Wiesel Nobel Acceptance Speech, *supra*, so we should center our attention on ways to save it.

Black life matters. Just as all life matters. If it is unconstitutionally abusive and injurious to dignity that, say, a gay couple might have to move to another State to get a marriage license, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), then it is probably safe to say that killing someone because he is black is at least as unconstitutionally foul and undignified.

If anyone on the Court ever wanted to play Atticus Finch from Harper Lee's *To Kill a Mockingbird* (1960), this is the time. Buck's color of skin is not a bad thing; the real "darkness" here is in a not-entirely-distinguishable-from-Nazi-esque legal process that would kill him because of his color. There is a real stench not just of lynching, but also of Auschwitz, in the very idea of executing Duane Buck because of the melanin level in his epidermis. So, while Amicus is no Faulkner, he notes this August that we could use some light from the Court, this Court which has not always provided the light they should have. Petitioner and people of good will look forward to the Court providing that light.

CONCLUSION

Amicus respectfully asks the Court to reverse the judgment of the court of appeals; and humbly thanks the Court for its time and consideration.

August 4, 2016 Respectfully submitted,

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Supreme Court of the United States

DUANE EDWARD BUCK,

Petitioner,

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Before a Texas jury may sentence a person to death in lieu of life imprisonment, it must conclude beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. Ann. art. 37.071 § (2)(b)(1), (2)(c). At Duane Buck's sentencing hearing, his own counsel offered "expert" testimony that Buck was more likely to commit future violence because he is black. Pet. App. B, at 2-3. By informing the jury, under a veneer of scientific respectability, that Buck was more likely to be violent because he is

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

African American, this testimony inserted into the proceedings an enduring racial stereotype that exerts a unique power in this nation and invited the jury to sentence Buck to death based on racial stereotypes and prejudices—even though the Constitution plainly forbids this. Because the Fifth Circuit ignored the singular power of this racial stereotype, as well as the prejudicial effect it was likely to have, its judgment should be reversed.

Texas's rule that no one may be sentenced to death absent a finding that he or she is likely to commit violence in the future is designed to "circumscribe the class of persons eligible for the death penalty," *Zant v. Stephens*, 462 U.S. 862, 878 (1983), and avoid placing "standardless sentencing power in the jury." *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976) (plurality opinion). By providing "objective standards" for the jury's decision, requirements like this one seek to give the jury members discretion while also ensuring that defendants are not treated as "members of a faceless, undifferentiated mass" but rather "as uniquely individual human beings." *Id.* at 303-04. Thus, "[w]hat is important at the [death] selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant*, 462 U.S. at 879; *see also Jurek v. Texas*, 428 U.S. 262, 273-74 (1976) (plurality opinion) ("the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death").

That individualized determination was compromised in this case by the testimony elicited by Buck's own counsel—later reemphasized by the prosecutor—that Buck was more likely to commit future violence

because he is black. Pet. App. B, at 2 (testimony that Buck was more likely to be violent because "'black people[] are over represented in the Criminal Justice System'" (quoting trial transcript)). Buck's black skin, the jury was told, is one of the "'statistical factors we know to predict future dangerousness.'" *Buck v. Thaler*, 132 S. Ct. 32, 35 (2011) (Sotomayor, J., dissenting from denial of certiorari) (quoting trial transcript).

The endorsement of this false stereotype by Dr. Walter Quijano, a psychologist retained by Buck's counsel and "stamped with the trial court's imprimatur as an expert," Pet. at 30, poisoned a hearing that was meant to focus on the unique facts of the case—unique facts that notably suggested Buck was unlikely to commit violence in prison. For example, the jury was presented with testimony that although Buck "suffered from dependent personality disorder . . . characterized by an unhealthy reluctance to let go of past relationships, even to the point of violent or destructive behavior," the fact that he "would be unable to develop similar dependent relationships in jail" meant he "was unlikely to commit future acts of violence." *Buck v. Thaler*, 345 F. App'x 923, 925 (5th Cir. 2009); Pet. App. D, at 4-5 (summarizing testimony of Drs. Lawrence and Quijano). Jurors also learned that Buck had "'no assaultive incidents either at TDC or in jail,'" and that this was "'a good sign that this person is controllable within a jail or prison setting.'" *Buck*, 132 S. Ct. at 35 (Sotomayor, J., dissenting from denial of certiorari) (quoting trial transcript).

By informing the jury, however, that Buck was more likely to be violent because he is African American, Dr. Quijano's testimony injected into the hearing a uniquely powerful racial stereotype. Indeed, the

depiction of African Americans as intrinsically violent is among the most persistent and well-known racial stereotypes in American society. Deeply entrenched in the nation's culture, the image of the dangerous black male has been reflected for generations in political discourse, scientific theorizing, and popular entertainment, all of which—sometimes explicitly, sometimes subtly—have portrayed black men as primitive, animalistic, dangerous, and criminal. And far from waning over time, the image of the violent black male has only become more prominent in recent decades, its infamy reaching new heights during the 1990s, when Buck was sentenced.

More than simply a persistent cultural motif, the stereotype of the violent black male has a demonstrable effect on perceptions and judgments, as documented by an array of social science research employing a variety of methods. Studies repeatedly find that perceptions of African American men are influenced significantly, and sometimes unconsciously, by the widespread stereotype that they are intrinsically violent—and that this phenomenon can affect judgments about their likelihood of future crime and the appropriateness of particular punishments. Whether the matter involves recalling the details of a scene, gauging the aggressiveness of ambiguous behavior, assessing the risk of danger in a given location, judging the extent to which a crime was attributable to the offender's inherent disposition, or evaluating the appropriate sanction, research consistently reveals that a latent association between African Americans and violence distorts perceptions of reality and leads to racially biased assessments.

The Constitution, however, plainly forbids these racial stereotypes from affecting the administration of justice. The Framers of our nation's enduring

charter inscribed in the original Bill of Rights the right to an "impartial" jury, *see* U.S. Const. amend. VI, capable of rendering decisions based only on the evidence presented in court and not on preconceived biases about the parties. This fundamental right, together with the Fourteenth Amendment's guarantee of equal protection of the laws, has long been understood to prohibit all racial prejudice and bias in the administration of justice, including in jury deliberations. Indeed, in the aftermath of the Civil War, as it became clear that racial biases were infecting jury deliberations with "[a]ll-white juries punish[ing] black defendants particularly harshly, while simultaneously refusing to punish violence by whites . . . against blacks and Republicans," James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L.J. 895, 909-10 (2004), Congress passed two pieces of legislation designed to guard against racial prejudices infecting Southern juries, *id.* at 923, 926, 930. Throughout the debates over these pieces of legislation, the bills' proponents made clear that racial bias in jury decision-making was intolerable, running afoul of both the Sixth and Fourteenth Amendments.

The Fifth Circuit ignored the singular power of the racial stereotype invoked in Buck's sentencing, as well as the extent to which such "expert" testimony was likely to prejudice the jurors, giving them license to sentence Buck on the basis of precisely the sorts of racial prejudices that the Constitution prohibits. Shrugging off Buck's claim of ineffective assistance of counsel, the Court of Appeals simply deemed it "unremarkable as far as IAC claims go" without further explanation. Pet. App. B, at 9. Thus, in denying Buck a certificate of appealability, the court below failed to reckon with, or even acknowledge, the pow-

erful sway that the stereotype of the violent black male continues to wield in American society.

In short, the endorsement of a uniquely pernicious racial stereotype during Buck's capital sentencing proceedings, particularly when combined with the other remarkable facts of his case, *see* Pet'r's Br. at 3-4, is precisely the sort of "extraordinary circumstance" that makes relief appropriate under Rule 60(b)(6) of the Federal Rules of Civil Procedure. And because the issue presently before the Court is simply whether Buck should have been granted a certificate of appealability on that issue, Buck need only show that these questions are debatable, *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). They plainly are, and the judgment of the Fifth Circuit should therefore be reversed.

ARGUMENT

I. THE DEPICTION OF BLACK MEN AS INHERENTLY VIOLENT IS AN ENDURING RACIAL STEREOTYPE THAT EXERTS A UNIQUE POWER IN THIS NATION

A. The Stereotype of the Violent Black Male is Deeply Entrenched in American History and Culture

Throughout our nation's history, people of African descent have been portrayed as intrinsically primitive, animalistic, dangerous, and criminal. The stereotype of the violent black male, in particular, has long permeated American society.

From the beginning of colonial-era contact between Africans and the English, "the African's different culture—for Englishmen, his 'savagery'—operated to make Negroes seem to Englishmen a radically different kind of men" and "somehow to place

[them] among the beasts." Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550–1812*, at 28 (1968); Richard Ligon, *A True & Exact History of the Island of Barbados* 46-47 (1657) (describing Africans as "a bloody people" and declaring that "most of them . . . are as neer beasts as may be, setting their souls aside"). In Buffon's influential eighteenth-century work *Histoire Naturelle*, a chapter describing the orangutan calls Negroes "almost equally wild, and as ugly as these apes." Count de Buffon, *The Natural History of Quadrupeds* 248 (1830 ed.). Such vile assessments found "justification" in the nascent European science of biological taxonomy, in which differences among human races were regarded as differences among species. Carl Linnaeus himself distinguished "*Homo sapiens afer* (the African black)" from "*Homo sapiens europaeus*," describing the former as "ruled by caprice" and the latter as "ruled by customs." Stephen Jay Gould, *The Mismeasure of Man* 35 (1981).

The "savage" nature of Africans, moreover, "took on an immediate and practical importance" in light of "the problem of slave control." Jordan, *supra*, at 232. In the antebellum United States, proslavery propaganda contrasted "the savage Negro of Africa and the 'civilized' black slave." George M. Frederickson, *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817–1914*, at 53 (1987 ed.). "According to this theory, the Negro was by nature a savage brute. Under slavery, however, he was 'domesticated' or, to a limited degree, 'civilized.' . . . . [R]emove or weaken the authority of the master," however, "and he would revert to type as a bloodthirsty savage." *Id.* at 53-54; *see id.* at 54-55 ("The notion that bestial savagery constituted the basic Negro character and that the loyal 'Sambo' fig-

ure was a social product of slavery . . . suggest[ed] a program of preventive action . . . . As a slave he was lovable, but as a freedman he would be a monster."). This concept "was . . . one of the most important contributions made by Southern proslavery propagandists to the racist imagery that outlasted slavery." *Id.* at 53.

After the Civil War, "a great fear of black insurrection and revenge seized many minds," C. Vann Woodward, *The Strange Career of Jim Crow* 23 (3d rev. ed. 1974), leading to a "striking . . . difference in attitude toward the Negro." Thomas F. Gossett, *Race: The History of an Idea in America* 261 (1997 ed.). The "lofty strain" of antebellum stereotype that had portrayed the African American as "loyal, devoted, willing to be led, childlike," was steadily supplanted by "an undisguised hatred of the Negro which portray[ed] him as little if any better than a beast." *Id.* at 261-62.

The efforts of Southern political leaders to promote this savage image "were deeply influenced by social Darwinism and the ideology of white supremacy." Aline Helg, *Black Men, Racial Stereotyping, and Violence in the U.S. South and Cuba at the Turn of the Century*, 42 Comp. Stud. Soc'y & Hist. 576, 579 (2000). Darwin's work, in the hands of his followers, "provided a new rationale within which nearly all the old convictions about race superiority and inferiority could find a place." Gossett, *supra*, at 145. Cloaking these convictions in a scientific lexicon, moreover, expanded their appeal beyond Southern partisans. "For many educated Americans who shunned the stigma of racial prejudice, science became an instrument which 'verified' the presumptive inferiority of the Negro and rationalized the politics of disenfranchisement and segregation into a social-scientific termi-

nology that satisfied the troubled conscience of the middle class." John S. Haller, Jr., *Outcasts from Evolution: Scientific Attitudes of Racial Inferiority, 1859–1900*, at xiv (1971); *see* Frederick L. Hoffman, *Race Traits and Tendencies of the American Negro* 218-28 (1896) (citing arrest and conviction rates revealing a "disproportionate number of colored criminals" as proof of "the specific criminal tendencies of the colored race").

Portrayals of blacks as violent and primitive also flourished in popular culture. Blackface minstrel performance, arguably "the most popular form of public entertainment in the nineteenth century," stressed "the primitiveness and irresponsibility of African-American men." Gerald R. Butters, Jr., *Black Manhood on the Silent Screen* 8 (2002). "As white men in blackface . . . minstrels could sing, dance, speak, move, and act in ways that were considered inappropriate for white men." *Id.* at 10. Minstrelsy thus offered "the use of the black body as an excuse for expressing 'baser' urges proper white society disallowed." Stephanie Dunson, *Black Misrepresentation in Nineteenth-Century Sheet Music Illustration*, *in Beyond Blackface: African Americans and the Creation of American Popular Culture* 45, 48 (W. Fitzhugh Brundage ed., 2011). A predominant character type in later minstrelsy was Zip Coon, "a post–Civil War Negro . . . who moved to the city and attempted to assimilate into white culture, usually with laughable results. . . . Eager to get a dollar without any work, Zip Coon was always on the make. He carried a switchblade" and, more than the plantation-based Sambo character, had "dangerous vices that were threatening to whites." Butters, *supra*, at 12.

"The minstrel stage provided many nineteenth-century Americans with their only impression of

black culture, and it was from the minstrel stage that black stereotypes would [later] enter into advertising, film, radio, and television." Angela M. Nelson, *African American Stereotypes in Prime-Time Television: An Overview, 1948–2007*, *in* 1 *African Americans and Popular Culture* 185, 187 (Todd Boyd ed., 2008). Dissemination of these stereotypes was abetted by "rapid development of mass communications, photography, and written media," Helg, *supra*, at 579, enabling "[a]dvertising postcards, songbooks, porcelains, piano sheet music, vaudeville, and literature" to perpetuate racist images. Butters, *supra*, at 21. Through these media, "[t]he dominant southern ideology of black inferiority became the popular national perception," *id.* at 3, and "stereotyped representations of blackness" were placed "at the center of commercial popular culture." Grace Elizabeth Hale, *Making Whiteness: The Culture of Segregation in the South, 1890–1940*, at 154 (1998).

For example, popular song at the turn of the century offered up portraits of violent, criminal blacks. In these songs, the "Zip Coon" persona "was converted from a primitive natural philosopher" who lampooned black pretentions "into a primitive brute." Jon W. Finson, *The Voices That Are Gone: Themes in Nineteenth-Century American Popular Song* 227 (1994). In "De Coon Dat Had De Razor," for instance, a fight erupts between two men at a ball, "where dem coons all carry razors," in which one man attacking another "cut[s] his ear clear off his head." *Id.* Illustrated on the song's sheet-music cover is a scowling, wide-eyed black man, in dandified urban clothing, holding an oversized razor while townspeople and a police officer flee. *See* Wm. F. Quown, *De Coon Dat Had De Razor* (White, Smith & Co. 1885), *available at* Libr. of Cong., *Image 1 of De Coon Dat Had De Ra-*

zor, https://www.loc.gov/resource/ihas.100007421.0/?sp=1. This "violent picture of African-Americans in late-nineteenth-century music" was replicated in many other "'homicidal' coon songs" that dwelled on "the image of the violent African American demon." Finson, *supra*, at 229, 232-33. And as these songs perpetuated racial stereotypes of "violence, lust, and irresponsibility," the "growing influence of popular music in the national marketplace helped standardize the stereotypical profile of black Americans." Susan Curtis, *Black Creativity and Black Stereotype*, *in Beyond Blackface*, *supra*, at 124, 137.

As political leaders in the South rolled back the progress made by African Americans during Reconstruction, an even harsher and more fear-inducing stereotype gained new prominence in popular discourse: the "black beast rapist." Hale, *supra*, at 233. During the last quarter of the nineteenth century, this image "began to dominate whites' representations of black men in the South." Helg, *supra*, at 578. "The Southern stereotype of the black rapist built on narratives of supposed African savagery, sexual license, and polygamy to claim that without the restraining effect of slavery, blacks would regress toward their natural bestiality." *Id.* (quotation marks omitted).

"'[T]o the ignorant and brutal young Negro,'" wrote Thomas Nelson Page in 1904, social equality "'signifies but one thing: the opportunity to enjoy, equally with white men, the privilege of cohabiting with white women.'" Gossett, *supra*, at 273. Such views led future U.S. senator Rebecca Felton to declare in 1897 that "if it takes lynching to protect women's dearest possession from drunken, ravenous beasts, then I say lynch a thousand a week if it becomes necessary." Hale, *supra*, at 108-09. Virginia

historian Phillip Alexander Bruce wrote that black men's desire for white women "moves them to gratify their lust at any cost," and with a "malignant atrocity" that has "no reflection in the whole extent of the natural history of the most bestial and ferocious animals." Phillip Alexander Bruce, *The Plantation Negro as a Freeman* 83, 84 (1889). Thus, "the icon of the black rapist transformed all blacks into outcasts and singled out the alleged barbarism and animal sexuality of the entire male population of African descent." Helg, *supra*, at 583.

With the advent of motion pictures, the Southern image of the violent black rapist found its way to a nationwide audience. Early films featuring blackface actors reproduced stereotypes that "were already popularized in American life and arts." Donald Bogle, *Coons, Mulattoes, Mammies, and Bucks: An Interpretive History of Blacks in American Films* 4 (4th ed. 2001). These films typically emphasized "the 'uncivilized' behavior of African Americans," with common tropes including the frenzied consumption of watermelon ("a strong visual symbol of the 'appetites' of black men" that caused them to "revert to primitiveness," Butters, *supra*, at 21-22), fighting with razors and guns, *id.* at 50, and chicken thievery, *id.* at 24-25, 28 ("Such cinematic depictions . . . documented the Radical southern position that black men were naturally driven to criminality.").

Then, in 1915, D.W. Griffith's epic *The Birth of a Nation* placed the stereotype of "the brutal black buck" center stage in indelible fashion. Bogle, *supra*, at 10. Griffith's film was a landmark, its technical achievement and grand scope transforming the film industry and making it one of the most profitable movies of all time. *Id.* at 16. Set during Reconstruction, as Northern interlopers have "unleash[ed] the

sadism and bestiality innate in the negro, turning the once congenial darkies into renegades," the film portrays its white protagonists terrorized by violent black men, with the ascension of the Ku Klux Klan ultimately bringing redemption. *See id.* at 11-14. Griffith's film was peppered with "barbaric black[s] out to raise havoc . . . . nameless characters setting out on a rampage full of black rage." *Id.* at 13. And in its portrayal of two key villains, who each menace white females at dramatic high points, the film's truly "archetypal figure" emerges—the "black bucks . . . oversexed and savage, violent and frenzied as they lust for white flesh." *Id.* at 13-14. "[P]lay[ing] hard on the bestiality of his black villainous bucks," Griffith's film attributed their desire for white women "to an animalism innate in the Negro male." *Id.* at 14.

The unremitting racism of *The Birth of a Nation*, together with the film's unprecedented popularity (it was the first to receive a White House screening), incited protests, and the controversy prevented African Americans from again receiving such vitriolic attention in films. But instead of replacing old stereotypes with more authentic depictions, Hollywood simply purged African Americans from the screen or relegated them to the margins, where their portrayal continued to be defined by typecasting. *See* Bogle, *supra*, at 10, 15-16; Butters, *supra*, at 83-84. The same was true in other media. By 1950, a news article decrying the portrayal of African Americans in advertising lamented the endurance of belittling clichés from the previous century: "Negroes may never be depicted in national ads in any but standard stereotypes. They can be used as 'Uncle Toms' or 'Aunt Jemimas,' or as wild savages, comic buffoons or grinning redcaps." *Reveal Jim Crow Policy in U.S.*

Advertising; 'Menial' Negroes Only Are Shown in Ads, April 1950, *quoted in* Linda G. Tucker, *Lockstep and Dance: Images of Black Men in Popular Culture* 68 (2007).

The stereotype of the brutal black male only increased in prominence as the twentieth century drew to a close. Indeed, during the 1980s and 1990s, "the typification of crime as a black male threat . . . achieved iconic proportions." Ted Chiricos et al., *Perceived Racial and Ethnic Composition of Neighborhood and Perceived Risk of Crime*, 48 Soc. Probs. 322, 322 (2001). Concerns about the drug trade and the lethality of inner-city violence fostered a dramatic spike in news coverage of crime. Combined with "a spate of new 'reality-based' cop shows, rescue programs, and tabloid offerings," this trend exposed Americans, "albeit vicariously, to more crime and violence than ever before." Douglas S. Massey, *Getting Away with Murder: Segregation and Violent Crime in Urban America*, 143 U. Pa. L. Rev. 1203, 1204-05 (1995). Thus, although nationwide crime rates were actually decreasing, many Americans nonetheless came to believe that they were "living through an unprecedented boom in violent crime," and "the people they [saw] committing increasingly lethal crimes [were] predominantly young, male, and black." *Id.*

Local television news, in particular, has been singled out by scholars for "depict[ing] life in America as pervaded by violence and danger" and for "heighten[ing] Whites' tendency to link these threats to Blacks." Robert M. Entman, *The Black Image in the White Mind: Media and Race in America* 78 (2000). One study found that local newscasts in twenty-nine cities were "pervaded with threatening images of minority crime suspects—many shown in police mug

shots, others bound in handcuffs closely guarded by police." Christopher P. Campbell, *Race, Myth and the News* 69 (1995). An examination of one city's local news broadcasting found that it "presented Blacks in physical custody more than twice as much as Whites," that "stories about Blacks were four times more likely to include mug shots," that whites were "more likely to receive helpful pro-defense soundbites," and that the programs "were more likely to provide an on-screen name for Whites accused of violence than for Blacks." Entman, *supra*, at 82-83, 85; *see id.* (explaining that the absence of such names "tends to efface the differences among individual Blacks"). Similar studies found African Americans "over-represented as perpetrators of crime in comparison to arrest records, [while] whites were underrepresented as perpetrators but were overrepresented as victims." Mary Beth Oliver, *African American Men as 'Criminal and Dangerous': Implications of Media Portrayals of Crime on the 'Criminalization' of African American Men*, 7 J. Afr. Am. Stud. 3, 6-7 (2003).

At the same time, menacing images of violent black men flourished in popular media, as the "proliferation of stereotyped, criminal characterizations of African American men bolster[ed] the marketing of consumer products" that exploited this image—such as black "gangsta" images featured "in the marketing of products such as malt liquor, compact disks, clothing, soft drinks, television programs, feature films, and home security systems." Randolph G. Potts, *The Social Construction and Social Marketing of the "Dangerous Black Man,"* 2 J. Afr. Am. Men 11, 12-13 (1997); *see* David Samuels, *The Rap on Rap*, New Republic, Nov. 11, 1991 (noting that "the more rappers were packaged as violent black criminals, the bigger

their white audiences became"); Tucker, *supra*, at 13 (discussing "the return of the black brute in the spectacular and audible form of the black male rapper").

By the 1990s, in short, there was "a widespread belief that black people, and particularly young black inner-city males, [were] far more prone to violence than white people." Evan Stark, *The Myth of Black Violence*, 38 Soc. Work 485, 485 (1993). Black Americans, as one commentator noted, had become "the repository for the American fear of crime." Katheryn Russell-Brown, *The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, Police Harassment, and Other Macroaggressions* xiii (1998).

This ascension of fears about black male violence took place alongside a revival of biological theories about inherent inequalities among the races. *See, e.g.*, Richard Herrnstein & Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (1994). Meanwhile, high-profile incidents made unmistakably clear the lingering connections that many made between African Americans and animalistic brutality. *See* Potts, *supra*, at 16 (recounting a 1992 controversy after the director of the National Institute of Mental Health "likened the violence of inner-city youth to the behavior of 'hyperaggressive,' 'hypersexual' male monkeys in the jungle"); Stark, *supra*, at 488 (noting that the young men accused of raping the Central Park jogger were characterized in the media "as 'animals,' 'dark creatures of the night,' a 'wilding wolf pack,' and the like"); S. Plous & Tyrone Williams, *Racial Stereotypes From the Days of American Slavery: A Continuing Legacy*, J. Applied Soc. Psychol. 795, 812 (1995) (describing reports that a Los Angeles police officer involved in the Rodney King beating "earlier that day referred to a domestic

dispute between blacks as 'right out of *Gorillas in the Mist*'").

In sum, generations of political discourse, scientific conjecture, and popular entertainment have depicted African American men as primitive, animalistic, dangerous, and criminal—perpetuating the stereotype of the violent black male. As the next Section discusses, this stereotype continues to have a distorting effect on perceptions and judgments today, as demonstrated by an array of social science research employing a variety of methods.

B. The Stereotype of the Violent Black Male Has a Demonstrable Effect on Perceptions and Judgments

Stereotypes are understood by psychologists as "'cognitive structures that contain the perceiver's knowledge, beliefs, and expectations about human groups,'" which, "like any other kind of cognitive generalization, tend to put their imprint on data in the very process of acquiring it." Mark Peffley et al., *Racial Stereotypes and Whites' Political Views of Blacks in the Context of Welfare and Crime*, 41 Am. J. Pol. Sci. 30, 31 (1997) (quoting David L. Hamilton & Tina K. Trolier, *Stereotypes and Stereotyping: An Overview of the Cognitive Approach* 127, 133, *in Prejudice, Discrimination, and Racism* (John F. Dovidio & Samuel L. Gaertner eds., 1986)). In the United States, "[a]lmost all Americans are aware of the prevalent stereotypes of the major racial groups." Lincoln Quillian, *Does Unconscious Racism Exist?*, 71 Soc. Psychol. Q. 6, 8 (2008). "Researchers have documented people's explicit knowledge of the societal stereotypes about Blacks in particular," who are "construed as violent, threatening, criminal, unintelligent, uneducated, lazy, poor, athletic, and musical." Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge,*

Historical Dehumanization, and Contemporary Consequences, 94 J. Personality & Soc. Psychol. 292, 294 (2008) (citing studies); *see id.* at 301 (reporting that "94% of present respondents . . . indicated being aware of the stereotype that Blacks are violent").

Racial stereotypes exert a powerful influence on perception and judgments even in the absence of animus, bigotry, or the endorsement of discriminatory views. That is, individuals need not harbor ill will or consciously subscribe to racist attitudes in order for their impressions to be affected by entrenched racial stereotypes. An influential body of research "has shown that even those who espouse the ideal of color blindness tend to associate whites with mostly positive traits and African Americans . . . with mostly negative traits," and that "these deep associations can affect our thoughts and actions without conscious awareness." Quillian, *supra*, at 7. Biases thus "may be unknown even to the person who holds them," Raj Andrew Ghoshal et al., *Beyond Bigotry: Teaching about Unconscious Prejudice*, 41 Teaching Soc. 130, 132 (2012), and "some research indicates that dominant cultural stereotypes affect even members of stereotyped groups." Lincoln Quillian & Devah Pager, *Estimating Risk: Stereotype Amplification and the Perceived Risk of Criminal Victimization*, 73 Soc. Psychol. Q. 79, 84 (2010). "[R]esearch has shown that discrimination is most likely to occur when nonracial justifications . . . are available," enabling individuals to preserve "their self-concept as nonprejudiced persons." Thomas E. Ford, *Effects of Stereotypical Television Portrayals of African-Americans on Person Perception*, 60 Soc. Psychol. Q. 266, 272 (1997).

"The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years." Jennifer L. Eber-

hardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 876, 876 (2004). "Research consistently finds that Americans hold strong associations between race and crime, and appear especially fearful about the risk of crime in the presence of black strangers." Quillian & Pager, *supra*, at 82.

> Researchers have highlighted the robustness and frequency of this stereotypic association by demonstrating its effects on numerous outcome variables, including people's memory for who was holding a deadly razor in a subway scene, people's evaluation of ambiguously aggressive behavior, people's decision to categorize nonweapons as weapons, the speed at which people decide to shoot someone holding a weapon, and the probability that they will shoot at all.

Eberhardt et al., *supra*, at 876 (internal citations omitted); *see* Lisa A. Harrison & Cynthia Willis Esqueda, *Race Stereotypes and Perceptions about Black Males Involved in Interpersonal Violence*, 5 J. Afr. Am. Men 81, 82 (2001) (citing studies showing that "behaviors by black males that are perceptually vague and ambiguous are more likely to be perceived as threatening than similar behaviors performed by their white counterparts"); Quillian, *supra*, at 7-8 (citing studies with same result).

One set of studies used "a diverse assortment of methods and procedures" to examine the unconscious association of blacks with crime. Eberhardt et al., *supra*, at 878. Its results demonstrated that subliminally exposing people to black male faces, instead of white male faces, increases the speed with which they subsequently recognize images of "crime-relevant ob-

jects," such as guns and knives, as the focus of those images is slowly increased. *Id.* at 878-81. Conversely, it found that exposing people to crime-relevant objects subsequently "prompts them to visually attend to Black male faces" more than white male faces, suggesting "[n]ot only are Blacks thought of as criminal, but also crime is thought of as Black." *Id.* at 878, 881-83. These studies further discovered that subliminally activating the concept of "crime" in the minds of participating police officers "increase[d] the likelihood that they [would] misremember a Black face as more stereotypically Black than it actually was." *Id.* at 878, 885-88.[2]

These results mirror other research indicating a pervasive association between African Americans and crime. Multiple studies, for instance, show that "perceived risk of criminal victimization is elevated by the perception that blacks live in one's neighborhood," independent of the actual local crime rate—illustrating the use of "a kind of a shorthand equation between blackness and crime." Chiricos et al., *supra*, at 334-35; *see* Quillian & Pager, *supra*, at 95, 97-98 (reporting that whites "appear to systematically downplay" other available information in favor of "placing great emphasis on racial composition as their primary guide to assessing risk").

Other research illustrates that latent stereotypes about black men are more likely to produce discriminatory results in situations where details presented

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[2] Similar methods reveal that the historical association of African Americans with apes, like the association with crime, continues to influence perceptions unconsciously. Among other findings, subliminally activating the concept of "apes" increases the degree to which participants condone police violence depicted in a video—but only where the suspect is understood to be black. Goff et al., *supra*, at 294, 301-02.

are consistent with the stereotype. One such study asked participants to assess the legitimacy of a police search described in a narrative, while providing different participants with variations on the scenario by manipulating both the race of the suspect and his personal attributes. "When responding to scenarios of blacks who confirm . . . their negative expectations . . . respondents consistently display a discriminatory double standard, such that they offer far more harsh judgments of blacks than of similarly described whites." Peffley et al., *supra*, at 52; *see id.* at 48-55.

Still other research indicates that racial biases can influence judgments about whether a violent act was more attributable to circumstances or to an offender's inherent disposition. Participants in one study read a narrative "that depicted violent acts committed by a man who had just learned that his 5-year engagement was terminated by his fiancé because she had a new boyfriend." James D. Johnson et al., *Race, Media, and Violence: Differential Racial Effects of Exposure to Violent News Stories*, 19 Basic & Applied Soc. Psychol. 81, 82 (1997). They then "answered a question that measured their attributions of the defendant's violent behavior (i.e., situational versus dispositional)." *Id.* Participants whose information about the defendant included a photo of a black man were more likely to attribute his behavior to inherent disposition than were participants who received a photograph of a white man, or no photograph at all. *Id.* at 84-86.

The evidence that racial stereotypes influence appraisals of dangerousness extends beyond laboratory research. One study examined juvenile delinquency proceedings to investigate whether "officials perceive minorities as more likely than white youths to commit future crimes." George S. Bridges & Sara

Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 Am. Soc. Rev. 554, 556 (1998). Among other things, the study concluded that "probation officers consistently portray black youths differently than white youths in their written court reports, more frequently attributing blacks' delinquency to negative attitudinal and personality traits." *Id.* at 567. Those attributions "shape assessments of the threat of future crime." *Id.*

With respect to capital proceedings, researchers have sought to explain why "studies continue to demonstrate that jurors' death sentencing behavior is significantly affected by the race of the defendant." Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 Law & Soc'y Rev. 69, 70 (2011). One method employed to investigate this disparity involves simulated sentencing hearings in which test participants serve as jurors. This method sacrifices a degree of realism for "greater control over extraneous variables, so that *only* the race of the defendant . . . can be systematically varied." *Id.* at 77. It also enables the use of questionnaires in which participants evaluate the evidence presented. *Id.* at 81-82. Such studies have found not only that black defendants are more likely to be sentenced to death, *id.* at 76-77, but also that this disparity "appears to be explained by the way the jurors differentially assessed the penalty-phase evidence." *Id.* at 88. In one study, white male jurors "were significantly more likely to agree that the black defendant liked to harm others . . . and that he was violent by nature." *Id.* at 91. These participants saw the black defendant as "more cold-hearted" and as "someone who would be

more likely to re-offend if given the chance." *Id.* at 91-92.

In sum, research consistently finds that perceptions of African American men are influenced significantly, and sometimes unconsciously, by the widespread stereotype that they are intrinsically violent—and that this phenomenon can affect judgments about their likelihood of future crime and the appropriateness of particular punishments.

II. THE SIXTH AND FOURTEENTH AMENDMENTS TOGETHER REFLECT A COMMITMENT TO RACE-BLIND JURY DECISION-MAKING

While racial stereotypes have long been prevalent in American culture, our Constitution reflects a commitment to eradicating such stereotypes from the administration of justice and ensuring that jury proceedings are free of racial bias and prejudice.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. Strongly rooted in the English common law, 4 William Blackstone, *Commentaries on the Laws of England* *350 (jury is a "sacred bulwark" of liberty), this jury guarantee was of paramount importance to the Framers, who viewed it as a central feature of a system of ordered liberty. *See* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 96-97 (1998); *see also* 2 Joseph Story, *Commentaries on the Constitution of the United States* 558 (5th ed. 1891) (describing the jury as "the great bulwark of [our] civil and political liberties").

As the Amendment's text makes clear, critical to the Framers' conception of a jury was the belief that its members should be impartial, that is, free of bias toward or against any of the parties. At common law, this proscription was typically used to prohibit jurors from serving if they were related to one of the parties or had some other interest in the case. *See* 3 Blackstone, *supra*, at *363. But the Amendment's assurance of an impartial jury, together with the Fourteenth Amendment's guarantee of equal protection of the laws, also prohibits jurors from acting on the basis of a bias toward or against any of the parties because of their race.

The original meaning of the Fourteenth Amendment's equal protection guarantee "establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Jacob Howard). The Framers of the Amendment were particularly concerned about racial discrimination in the administration of criminal justice, and wrote the equal protection guarantee to prevent "different degrees of punishment" from being "inflicted, not on account of the magnitude of the crime, but according to the color of the skin." *Id.* at 2459 (statement of Rep. Stevens). The Framers decreed that "[w]hatever law punishes a white man for a crime shall punish the black man precisely in the same way," *id.*, doing away "with the injustice of subjecting one caste of persons to a code not applicable to another" and "prohibit[ing] the hanging of a black man for a crime for which the white man is not to be hanged." *Id.* at 2766.

In the aftermath of the Civil War, Southern states turned a blind eye to the daily "acts of cruelty, oppression and murder," *see Report of the Joint Committee on Reconstruction, at the First Session Thirty-Ninth Congress* xvii (1866), that Southern whites perpetrated to terrify and intimidate the newly freed slaves and their allies. A key aspect of the problem was juror bias. Witnesses told the Joint Committee on Reconstruction that "since the surrender and coming home of the rebels, there is less chance for getting a jury who will act justly." *Report of the Joint Committee on Reconstruction* pt. 2, *supra*, at 33. Indeed, "[a]ll-white juries punished black defendants particularly harshly, while simultaneously refusing to punish violence by whites . . . against blacks and Republicans." Forman, *supra*, at 909-10.

Over the course of Reconstruction, the Framers of the Reconstruction Amendments repeatedly acted to ensure the existence of impartial juries that would fairly apply the law to all regardless of race. Action first came in the form of the Civil Rights (Ku Klux Klan) Act of 1871, ch. 22, 17 Stat. 13 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.). Although the "principal targets" of the Act were "the Klan itself and the violence it perpetuated," proponents of the legislation recognized that a principal reason why Klan members were able to wage terror with impunity "was the failure of Southern juries to punish violence against blacks and Republicans." Forman, *supra*, at 920-21; *see, e.g.*, Cong. Globe, 42d Cong. 1st Sess. 158 (1871) (Judge Settle of the North Carolina Supreme Court explaining that "[t]he defect lies not so much with the courts as with the juries").

The Civil Rights Act of 1871 produced marked successes, Forman, *supra*, at 925, but it was not the only legislation introduced to address the problem of

Southern juries that were infected by racial bias. In 1870, Senator Charles Sumner of Massachusetts introduced legislation to "prohibit[] discrimination in the selection of jurors and provid[e] penalties for officials who disobeyed." Forman, *supra*, at 926; *see id.* at n.160 ("no person shall be disqualified for service as juror in any court, national or State, by reason of race, color, or previous condition of servitude" (quoting S. 916, 41st Cong. § 4 (1870))).

In supporting the legislation, senators recognized that black Americans could not enjoy equality under the law if they were tried by all-white juries that were prejudiced against them. For example, Senator Oliver Morton of Indiana noted "the prejudices against the colored race entertained by the white race, even in some of the Northern States and certainly in all of the Southern States" and asked whether "the colored man enjoys the equal protection of the laws, if the jury that is to try him for a crime or determine his right to property must be made up exclusively of the white race?" 3 Cong. Rec. 1793 (1875) (statement of Sen. Morton).

Other members of Congress also spoke about the difficulties in securing justice for black defendants, saying, "Every colored man tried as a criminal appears before a jury who are inclined to believe him guilty because of his race . . . ." 2 Cong. Rec. 427 (1874) (statement of Rep. Stowell). One Senator invoked Justice Strong who in 1874 spoke from the bench about the inability of black Americans to receive a fair trial: "It is also well known that in many quarters prejudices existed against the colored race, which naturally affected the administration of justice in the State courts, and operated harshly when one of that race was a party accused." 2 Cong. Rec. 4148

(1874) (statement of Sen. Howe) (quoting *Blyew v. United States*, 80 U.S. 581, 593 (1871)).

During debates over Senator Sumner's bill, black Americans living in the South advised members of Congress that "it is almost if not quite impossible for a black man to obtain justice" in Southern courts. Message from the President of the United States, Transmitting a Memorial of a Convention of Colored Citizens Assembled in the City of Montgomery, Ala. on December 2, 1874, H. Exec. Doc. No. 46, at 4-5 (1874). They explained that

> from . . . the antipathies and prejudices of race, which are generally inflamed by artful and sometimes by undisguised appeals by counsel to these passions, it results that our race is deprived of their constitutional right under the constitution of the State to a trial by an 'impartial jury,' and of our right under the 13th and 14th amendments to the Constitution of the United States 'to the equal protection of the laws.'

Id. at 5.

The day before the Senate passed Senator Sumner's bill, which became the Civil Rights Act of 1875, Senator Morton gave a rousing speech in which he captured the spirit of the legislation. In response to an opponent of the bill, Senator Morton asked

> whether the colored men . . . have the equal protection of the laws when the control of their right to life, liberty, and property is placed exclusively in the hands of another race of men, hostile to them, in many respects prejudiced against them, men who have been edu-

> cated and taught to believe that colored men have no civil and political rights that white men are bound to respect.

3 Cong. Rec. 1795 (1875) (statement of Sen. Morton).

As this history indicates, the Sixth Amendment right to an "impartial" jury, together with the Fourteenth Amendment's guarantee of equal protection, has long been understood to require juries whose decisions are free of racial prejudice and bias.

III. THE ENDORSEMENT OF A UNIQUELY POWERFUL RACIAL STEREOTYPE DURING A CAPITAL SENTENCING HEARING IS AN "EXTRAORDINARY CIRCUMSTANCE" JUSTIFYING RELIEF UNDER RULE 60(B)(6)

Reflecting our nation's deep constitutional commitment to impartial juries and equal protection of the laws, this Court's decisions have long acknowledged that racial bias has no place in the criminal justice system. *See, e.g.*, *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) (plurality opinion) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."); *see also Amici* Brief of the Hon. Mark L. Early et al. 4-7; *Amicus* Brief of Constitutional Accountability Center at 18-23, *Peña Rodriguez v. Colorado*, No. 15-606 (U.S. June 30, 2016).

This Court has further recognized that, "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion). Numerous factors enhance this risk. "Key elements of the death penalty decision . . . are inherently subjective assessments whose

parameters are both unfamiliar and emotionally wrought," and "[r]esearch suggests that racial animus may be more readily mobilized and acted upon in a setting where decisionmaking norms are so ambiguous." Lynch & Haney, *supra*, at 74. The risk is further elevated where a black defendant's crime appears to confirm the ubiquitous stereotype about his race's violent nature. Even without the encouragement of an expert witness endorsing that stereotype, individuals "offer far more harsh judgments of blacks than of similarly described whites" when those blacks have shown traits that confirm negative stereotypical expectations. Peffley et al., *supra*, at 52; *see* Lynch & Haney, *supra*, at 74.

As explained earlier, the racial stereotype invoked at Buck's sentencing hearing is deeply entrenched in American culture and continues to distort perceptions and judgments today. The archetype of the violent black male, in other words, inevitably shapes the lens through which jurors in a case like this one strive to assess the facts in order to decide questions of character and propensity. Against this backdrop, Dr. Quijano's testimony was distinctly prejudicial: not only did it dredge to the surface a powerful, latent racial stereotype, it gave jurors a license—indeed, an obligation—to consider it as they resolved the key question at Buck's sentencing hearing, that is, his likelihood of future violence.

Jurors could assume that Dr. Quijano, an expert witness whose testimony was admitted by the court, had "a reliable basis in the knowledge and experience of his discipline," *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993), for his assertion that race is one of the "'statistical factors we know to predict future dangerousness,'" *Buck*, 132 S. Ct. at 35

(Sotomayor, J., dissenting from denial of certiorari) (quoting trial transcript), and his agreement that "'the race factor, black, increases [Buck's] future dangerousness.'" Pet. App. B, at 3 (quoting trial transcript). Dr. Quijano thus provided jurors with a means of relying on an age-old racial stereotype while maintaining a sense that their assessment of the evidence was untainted by bigotry. His testimony made it possible for jurors who did not want to think of themselves as prejudiced to nonetheless rely on invidious racial generalizations in making their sentencing decision. Put differently, in light of Dr. Quijano's testimony, it was only reasonable for jurors to suppose that considering Buck's race in their decision, and counting it as a portent of future dangerousness, represented a faithful discharge of their duty to weigh the evidence presented to them—not as an act at odds with the Constitution's commitment to the race-blind administration of justice. And by reemphasizing this aspect of Dr. Quijano's testimony on cross-examination, the prosecutor increased the chances that the jury would indeed weigh "the race factor" in its deliberations.

Supplying an ostensibly nondiscriminatory basis for considering Buck's race was especially problematic because, as studies have shown, "discrimination is most likely to occur when nonracial justifications . . . are available." Ford, *supra*, at 272; *see* Lynch & Haney, *supra*, at 72. For similar reasons, the measured phrasing of Dr. Quijano's testimony, and the prosecutor's questioning, may have been *more* pernicious in their effects than an inflammatory appeal to racial passions, which would have risked provoking a backlash among jurors who were striving to be even-handed. A purported expert's sober assertion that Buck's race statistically increased his dan-

gerousness, coupled with an expression of regret for this "'sad'" reality, Pet. App. B, at 2 (quoting trial transcript), enabled jurors to rely on a racial stereotype without "challeng[ing] their self-concept as non-prejudiced persons." Ford, *supra*, at 272.

Nor did the brevity of Dr. Quijano's comments on race render their impact "*de minimis*," as the district court concluded. Pet. App. D, at 10. As explained in Section I, the image of African Americans as intrinsically violent is among the most persistent and well-known stereotypes in American society—one that repeatedly has been at the center of highly polarizing political and social controversies. Invoking this stereotype, even briefly, inevitably calls to mind a plethora of emotionally charged images and sentiments. Where such a powerful racial stereotype is elicited by the defense, reemphasized by the prosecutor, and endorsed in a professional expert report made available for scrutiny—all with the approval of the court—its impact on the jury cannot be dismissed as the district court did, much less ignored entirely as the Fifth Circuit did.

To the contrary, because such open racial bias strikes at the integrity of the judicial system itself, it urgently calls for relief under Rule 60(b)(6), which "provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) (quoting *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949)); *see Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233-34 (1995) (Rule 60(b) "reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would

work inequity" (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944))).

Significantly, proper consideration of "justice" and "inequity" under Rule 60(b) reaches beyond the parties before the court to encompass the wider public interest. *See Liljeberg*, 486 U.S. at 864 (in granting Rule 60(b)(6) relief where a judge's impartiality was called into question, this Court explained that "it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process"). Indeed, respect for the finality of judgments, which generally counsels against their disturbance, itself "springs from the belief that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered." *Hazel-Atlas Glass Co.*, 322 U.S. at 244. Because the public interest in finality must be weighed against the public interest in ensuring the integrity of the nation's justice system, this Court has recognized that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Sanders v. United States*, 373 U.S. 1, 8 (1963); *cf. Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005) (finality is a "policy consideration" that, "standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality").

These considerations regarding the integrity of the nation's justice system are all the more compelling in the context of a capital sentencing hearing. "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather

than caprice or emotion." *Zant*, 462 U.S. at 885 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)). Such a momentous decision requires assessing "the characteristics of the person who committed the crime," *Gregg v. Georgia*, 428 U.S. 153, 197 (1976) (plurality opinion), because capital defendants must be treated not as "members of a faceless, undifferentiated mass" but rather "as uniquely individual human beings," *Woodson*, 428 U.S. at 303-04 (plurality opinion). That individualized assessment was compromised here, by an expert's endorsement of the long-standing stereotype that black men, as a group, are inherently violent.

For the Court to declare that endorsement of this powerful racial stereotype in a court of law—as jurors weighed the sentence of death—does not even debatably constitute an "extraordinary circumstance" would fundamentally damage the integrity of our nation's judicial system.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DUANE EDUARD BUCK,

Petitioner,

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF FORMER PROSECUTORS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are former state and federal prosecutors, including former attorney generals, who were responsible for the enforcement of federal and state criminal laws. Amici represent a wide range of political affiliations and views on capital punishment. All amici agree, however, that where the State imposes a capital sentence, there is a solemn duty to ensure that the sentencing hearing is conducted in compliance with both prosecutorial ethics and all fundamental constitutional guarantees afforded to criminal defendants. As former law enforcement officials, amici have a strong interest in ensuring that no capital sentence is imposed where a failure of prosecutorial ethics has permitted a sentencing determination to be influenced by a defendant's race. Amici also believe that public faith in the independence of law enforcement requires adherence to the promises that prosecutors make to defendants. The failure to live by such promises to a capital defendant, in particular, constitutes an extraordinary departure from the ethical conduct that the public expects and deserves.

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part, and no persons other than amici *curiae* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Prosecutors in our criminal justice system are tasked with a special obligation: prosecutors must seek justice, not just convictions, even when that duty requires foregoing or overturning a conviction in order to protect a defendant's constitutional rights. Among the most important of those rights is the constitutional assurance that no defendant's sentence will be determined based upon race. In no context is this obligation more important than in capital cases, where the state seeks to impose the ultimate penalty.

This is an extraordinary case that calls for extraordinary relief. The State of Texas learned that a particular expert witness, Dr. Walter Quijano, had offered racially-biased testimony in a number of death penalty cases. Specifically, Dr. Quijano's modus operandi was to argue that a defendant's future dangerousness could be predicted, at least in part, by the defendant's race. Upon reviewing these cases, the Attorney General of Texas at the time, John Cornyn, determined that Dr. Quijano's testimony was forbidden by the U.S. Constitution, and that no death sentence should be permitted to stand if the jury was exposed to this testimony. But when Attorney General Cornyn left office, his successor reversed course with respect to Petitioner—and Petitioner alone.

The intial decision made by Attorney General Cornyn to concede error represents the highest ideals with regard to prosecutorial ethics and demonstrates a prosecutor's most serious obligations to uphold these ethics. The decision of his successor to reverse course, on the basis of a specious

distinction, is at odds with the ideals to which prosecutors should aspire and the obligations to which a prosecutor must adhere. In short, no execution should turn upon a distinction as arbitrary as the one offered in this case.

It is true, of course, that the expert testimony at issue in this case was first introduced by the defense, but that tells only part of the story. Texas ignores that following Dr. Quijano's direct examination, the prosecutor compounded defense counsel's error by eliciting additional testimony from Dr. Quijano that Petitioner's race made him more dangerous. The prosecutor then returned to that testimony, and expanded the constitutional error, in her closing argument. And even that fact fails to distinguish Petitioner's case from others that have been reversed.

Our Constitution, as well as the integrity of our criminal justice system, requires more from our prosecutors than Respondents have offered here. This case is indeed extraordinary, and further judicial review is warranted. This Court should find that the Fifth Circuit erred in denying Petitioner a certificate of appealability.

ARGUMENT

I. IN CONCEDING ERROR, ATTORNEY GENERAL CORNYN APPROPRIATELY DISCHARGED HIS DUTY TO REMEDY UNCONSTITUTIONAL PROSECUTORIAL CONDUCT

Attorney General Cornyn correctly concluded that Petitioner's sentence of death could not be permitted to stand given that it was indisputably based, at least in part, on improper testimony that

Petitioner would be more dangerous in the future because he was black. The decision to acknowledge this error was in the best and most important traditions of law enforcement. It was, moreover, consistent with the Attorney General's duty to remedy a plain violation of a defendant's constitutional rights.

A. The Prosecutor in Petitioner's Sentencing Hearing Improperly Elicited Testimony that Petitioner Was More Likely to Re-Offend Because of His Race

Prosecutors must eschew racist testimony, not elicit it. Respondents apparently agree, arguing that "it is always inappropriate for the State to ask jurors to consider a defendant's race when assessing guilt or imposing punishment, but in Buck's case that is not what happened." Br. for Resp't in Opp'n to Pet. for a Writ of Cert. at ii, *Buck v. Stephens*, No. 15-8049 (Mar. 21, 2016). That sentence's first declaration is correct, but its conclusion is not. The record below demonstrates that the prosecutor, having just witnessed the expert witness' improper testimony using race to forecast future dangerousness, returned to that testimony and highlighted the expert's constitutionally-impermissible opinion.

The issue of race initially arose in Petitioner's case when Dr. Quijano testified, as a witness for the defense on direct examination, that Petitioner's race increased the probability that he would be dangerous in the future. Although race cannot be considered as an aggravating factor at capital sentencing, *e.g.*, *Zant v. Stephens*, 462 U.S. 862, 885 (1983), Dr. Quijano's opinion urged the jurors to do

just that. Dr. Quijano's opinion apparently stemmed from his view that African Americans are "over represented in the Criminal Justice System. Tr. of Sentencing Hr'g ("Tr.") at 111:1-4, May 6, 1997, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June 24, 2005), ECF No. 5-114. Dr. Quijano's Expert Report, which was submitted as a defense exhibit, stated in unequivocal terms: "Race. Black. Increased Probability [of future dangerousness]." Forensic Psychological Evaluation at 7, *Buck v. Stephens*, No. 4:04-cv-0396565 (S.D. Tex. June 24, 2005), ECF No. 5-118, p. 24.

The constitutionally deficient portion of Dr. Quijano's testimony did not stop at his direct examination because the prosecutor compounded the error on cross-examination. Specifically, the prosecutor returned to and highlighted Dr. Quijano's racially-charged testimony by asking: "You have determined that . . . the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?" Tr. at 160:8-15, ECF No. 5-115, p. 17 Dr. Quijano responded: "Yes." *Id.* Having read Dr. Quijano's expert report, and having just heard Dr. Quijano's testimony on direct examination, the prosecutor knew that Dr. Quijano would reply in the affirmative. Thus, notwithstanding that defense counsel first introduced the offensive testimony, it is not seriously in dispute that the prosecutor intentionally elicited testimony from the same expert that Petitioner's race made him more dangerous.

The prosecutor made matters worse in her closing argument. There, the prosecutor unequivocally endorsed the offensive testimony by urging the jury to rely upon Dr. Quijano's testimony

when determining if Petitioner was likely to commit a violent offense in the future. Tr. at 260:13-21, ECF No. 5-117 ("You heard from Dr. Quijano, who had a lot of experience in the Texas Department of Corrections, who told you that there was a probability that the man would commit future acts of violence."). In order to issue a judgment imposing the death penalty, the jury was required to agree unanimously that Petitioner was dangerous as a result of his propensity to commit violent acts. *See* Tex. Code Crim. Proc. Ann. art. 37.071, § 2 (West 1981 and Supp. 1993). By referencing Dr. Quijano's testimony in her closing, the prosecutor encouraged the jury to consider Petitioner's race when evaluating dangerousness, and consequently ensured that racist assumptions regarding dangerousness were before the jury as it proceeded to deliberate.

Injecting racial bias into a criminal trial offends the constitutional constraints that limit the exercise of prosecutorial discretion. Such constraints include the "equal protection component of the Due Process Clause of the Fifth Amendment," which precludes a prosecutor from making enforcement decisions based upon "an unjustifiable standard such as race, religion, or other arbitrary classification." *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *cf. Rose v. Mitchell*, 443 U.S. 545, 563 (1979) ("The claim that the court has discriminated on the basis of race in a given case brings the integrity of the judicial system into direct question."); *id.* at 555 ("Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice."). This kind of testimony deprives the defendant of his fundamental right to a

fair trial, i.e., one in which the "jury consider[s] only relevant and competent evidence," *Bruton v. United States*, 391 U.S. 123, 131 n.6 (1968), "free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability," *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (citations omitted).

Strict adherence to prosecutorial ethics is important in every case, but even more so in capital cases. The death penalty, of course, is the most grave sanction our justice system recognizes. The severity and permanence of the sanction imposes special obligations upon those who participate in its administration to ensure that the jury exercises its discretion in an appropriate manner. *See Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion) ("Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected."). Among those obligations are the requirements to seek application of the penalty with impartiality, integrity, and objectivity, all of which forbid reliance on racial bias or prejudice. *See, e.g., United States v. Webster*, 162 F.3d 308, 356 (5th Cir. 1998) (recognizing that "a long line of Supreme Court precedent admonishes that the guillotine must be as colorblind as is the Constitution") (citations omitted). This is particularly so when future dangerousness is at issue: "Fear of blacks, which could easily be stirred up by the violent facts of [a] crime, might incline a juror to favor the death penalty." *Murray*, 476 U.S. at 35.

Encouraging testimony like Dr. Quijano's violates the National Prosecution Standards published by the National District Attorneys

Association, which are "intended to be guides for prosecutors" in the "day-to-day performance of the prosecution function." National District Att'ys Assn., National Prosecution Standards with Revised Commentary at 1 (3d ed. 2009) ("NPS"). This Court has recognized the authoritative role the National Prosecution Standards possess and has relied upon them to determine what public acts are an "integral part of a prosecutor's job." *Buckley v. Fitzsimmons*, 509 U.S. 259, 278 (1993). Under those standards, the prosecutor's "Primary Responsibility" is to serve as an "independent administrator of justice" and "to seek justice, which can only be achieved by the representation and presentation of the truth." NPS 1-1.1.[2] Prosecutors must uphold their "special duty to seek justice, not merely to convict." *Connick v. Thompson*, 563 U.S. 51, 65–66 (2011) (internal quotation marks and citation omitted).

Prosecutors are obligated to keep discrimination out of criminal prosecutions, from investigation through trial and appeal. The National Prosecution Standards require that a "criminal investigation should not begin or be continued if it is motivated in whole or part" by the "perpetrator's race, ethnicity, religion, sexual orientation, or political affiliation . . . ." NPS 3-1.2.[3] These duties do not disappear once

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[2] These National Prosection Standards are substantially similar to the National Prosecution Standards in effect during the Petitioner's sentencing hearing in 1997. *See* National District Att'ys Assn., National Prosecution Standards R. 1.1 (2d ed. 1991) ("The Primary responsibility of prosecution is to see that justice is done.") (hereinafter "1991 NPS").

[3] This Standard is substantially similar to several of the rules in existence under the prior edition of the National Prosecution Standards. *See* 1991 NPS, R. 42.1 ("The decision to initiate or

trial begins. As this Court has explained, the ethical obligations that attach to a decision to indict a case apply with equal force to the prosecutor's conduct at both trial and sentencing. *See Imbler v. Pachtman*, 424 U.S. 409, 424 (1976) ("A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court.").

The fact that Petitioner's counsel first introduced the constitutionally suspect testimony does not excuse the prosecutor's conduct. A prosecutor cannot "ask a question that implies the existence of a factual predicate that the prosecutor either knows to be untrue or has no reasonable objective basis for believing is true." NPS 6-6.2.[4] Further, in "closing argument, a prosecutor should be fair and accurate in the discussion of the law, the facts, and the reasonable inferences that may be drawn from the

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pursue criminal charges should be within the discretion of the prosecutor."); *id.* at 42.4 ("Factors which should not be considered in this decision include: d. Factors of the accused legally recognized to be deemed invidious discrimination insofar as those factors are nor pertinent to the elements of the crime.").

[4] *See also* 1991 NPS, R. 77.2 ("Counsel should not ask a question which implies the existence of a factual predicate which he knows to be untrue or has no reasonable objective basis for believing is true."); *id.* R. 77.5 ("The purpose of cross-examination is a good faith quest for the ascertainment of truth and should be conducted pursuant to this purpose."); *id.* R. 77 cmt. ("The prosecuting attorney, in his examination of witnesses on both direct and cross, should be guided by conduct that is not inconsistent with a good faith quest for the ascertainment of the truth. Prejudicial error, bred by improper examination tactics, might result in an undesirable conclusion of a criminal trial. The interrogation of all witnesses should be conducted fairly ").

facts." *Id.* 6-8.1.[5] The same standards impose a duty to respond to misconduct, providing that a "prosecutor is obligated to respond to professional misconduct that has, will, or has the potential to interfere with the proper administration of justice[.]" *Id.* 1-1.6.[6] The prosecutor's duty to seek justice, in short, precludes efforts to amplify or highlight impermissible testimony or arguments such as Dr. Quijano's improper testimony.

The prosecutor in this matter failed to live up to professional standards. If the prosecutor understood the impropriety and falsity of the notion that Petitioner's race was probative of his likelihood of reoffending, yet advanced that argument nonetheless, then the prosecutor improperly advanced a factual predicate that she knew "to be untrue." *Id.* 6-6.2. Conversely, if the prosecutor actually believed that Petitioner's race could, in fact, impact his likelihood of reoffending, then the prosecutor allowed her racial bias to infect the proceedings in violation of multiple standards, including National Prosecution Standard 3-1.2. In sum, whether the prosecutor subscribed to the veracity of Dr. Quijano's testimony or not, the

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[5] *See also* 1991 NPS, R. 85.1 ("Closing arguments should be characterized by fairness, accuracy, rationality, and a reliance upon the evidence or reasonable inferences drawn therefrom.").

[6] *See also* 1991 NPS, R. 25.5 ("When a prosecutor has reasonable suspicion of misconduct by defense counsel, the prosecutor has a responsibility to take such action necessary to substantiate or dispel such suspicion."); *id.* R. 25.6 ("When a prosecutor has knowledge of misconduct by defense counsel, the prosecutor has the responsibility to report that knowledge to the appropriate authority and take such other actions necessary to sanction the misconduct.").

decision to reference and underscore it violated the "special duty of the prosecutor to seek justice." *Connick*, 563 U.S. at 65.

Prosecutors are held to especially high standards in the sentencing process. During sentencing, a prosecutor "should seek to assure that a fair and fully informed judgment is made and that unfair sentences and unfair sentence disparities are avoided." NPS 7-1.1.[7] In questioning Dr. Quijano and in arguing to the jury that it should rely on his testimony, the prosecutor baited the jury into imposing its sentence based upon racial bias, which plainly violated that duty.

In sum, the prosecutor's decision to elicit racially-biased testimony in an effort to justify the imposition of the death penalty in Petitioner's case is incompatible with the expectations placed upon prosecutors, as well as fundamental conceptions of due process and individualized justice.

B. Attorney General Cornyn Appropriately Decided to Concede Error in Petitioner's Sentencing Hearing

Attorney General Cornyn first became aware of Dr. Quijano's racially biased testimony when a Petition for Certiorari was filed in *Saldaño v. Texas*, 530 U.S. 1212 (2000). *See* Press Release, Office of the Tex. Att'y Gen., Statement from Attorney General John Cornyn Regarding Death Penalty Cases, Office of the Attorney General News Release (June 9, 2000), *available at*

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[7] *See also* 1991 NPS, R. 88.4 ("To the extent that the prosecution becomes involved in the sentencing process, it should seek to assure that a fair and informed judgment is made and that unfair sentence disparities are avoided.")

https://texasattorneygeneral.gov/newspubs/newsarchive/2000/20000609death.htm (last visited Aug. 2, 2016) ("June 9 Statement") (noting that the Attorney General's Office had "identified problems associated with the testimony of Dr. Walter Quijano"). In his press release, Attorney General Cornyn stressed that "it is inappropriate to allow race to be considered as a factor in our criminal justice system." *Id.*

Commenting on the testimony in *Saldaño*, which was substantively indistinguishable from the challenged testimony at issue here, Attorney General Cornyn observed that the "evidence of the defendant's race . . . introduced before the jury by a district attorney as a factor for the jury to weigh in making its determination . . . violated Mr. Saldaño's constitutional right to be sentenced without regard to the color of his skin." Press Release, Office of the Tex. Att'y Gen., U.S. Supreme Court Grants State's Motion in Capital Case (June 5, 2000), *available at* https://texasattorneygeneral.gov/newspubs/newsarchive/2000/20000605saldanostatement.htm (last visted Aug. 2, 2016). Attorney General Cornyn concluded by vowing to the people of Texas to "continue to do everything I can to assure Texans of our commitment to an equitable criminal justice system." June 9 Statement, *supra*. Following his statement, Attorney General Cornyn conceded constitutional error in the State's brief responding to Saldaño's Petition for Certiorari, noting that "[d]iscriminaion on the basis of race, odious in all aspects, is especially pernicious in the administration of justice," because "the infusion of race as a factor for the jury to weigh in making its determination violated [Mr. Saldaño's]

constitutional right to be sentenced without regard to the color of his skin." Resp. to Pet. for Cert. at 7-8, No. 99–8119, *Saldaño v. Texas*, 530 U.S. 1212 (2000).

Attorney General Cornyn's discovery that sentencing hearings besides Saldaño's may have been tainted with racial bias triggered an obligation to investigate to ensure that no pending sentence had derived from constitutionally suspect sentencing hearings. As discussed *supra*, prosecutors must "respond to professional misconduct that has, will, or has the potential to interfere with the proper administration of justice." National Prosecution Standard 1-1.6.

Attorney General Cornyn thus undertook a "thorough audit" of the relevant cases and identified six cases in which constitutional violations occurred. June 9 Statement, *supra*. He sent letters to the parties in those six cases "advising them of" his findings. *Id.* One of those six was Petitioner's case. Press Release, Office of the Tex. Att'y Gen. (June 9, 2000), *available at* https://texasattorneygeneral.gov/newspubs/newsarchive/2000/20000609saldanocases.htm (last visited Aug. 2, 2016) The Attorney General's Office advised counsel for these six defendants, including Petitioner's counsel, that his office would not object if these defendants sought to overturn the death sentences and seek a new sentencing hearing based on the constitutional violations created by Dr. Quijano's testimony. *See* Jim Yardley, *Racial Bias Found in Six More Capital Cases*, N.Y. TIMES (June 11, 2000), http://www.nytimes.com/2000/06/11/us/racial-bias-found-in-six-more-capital-cases.html (last visited Aug. 2, 2016). To ensure consistency in

the application of justice, Attorney General Cornyn also requested that local prosecutors review their cases, which had not yet reached the Attorney General's office, to ensure that none of these cases were constitutionally improper. *See* June 9 Statement, *supra*.

Texas' decision to backtrack on Attorney General Cornyn's promise is extraordinary. Life or death decisions regarding the administration of a state's criminal justice system should be made with transparency, sobriety, and clarity, and they should endeavor to offer finality to both defendants and victims alike. Attorney General Cornyn's decision to take corrective action was mandated by the need to ensure the consistent administration of justice, given Texas' decision to offer relief to every other similarly-situated prisoner. The decision was also compelled by the duties of the Attorney General's office, the oath Cornyn took upon assuming duty, and the integrity the citizens of Texas expect from their public officials. To backtrack on an ethical obligation and decision to grant relief to a defendant in any context is extraordinary; it is particularly so here, where the purpose of backtracking was to defend the propriety of a capital sentencing hearing tainted by racist testimony.

II. TEXAS' DECISION TO RENEGE ON ITS PROMISE NOT TO OPPOSE PETITIONER'S REQUEST FOR A NEW SENTENCE UNDERMINES THE INTEGRITY OF THE JUDICIAL SYSTEM

The public has a need and a right to expect that the promises made by a state's highest-ranking law enforcement officials will be followed and faithfully

implemented. The opposite happened here. As discussed *supra*, following Attorney General Cornyn's public confession of error in Petitioner's case, the new Attorney General of Texas reversed the position and challenged the very petition that his predecessor invited Petitioner to file. *See, e.g.*, Opp'n to Appl. for Certificate of Appealability, No. 06-70035, *Buck v. Thaler*, 345 F. App'x 923 (5th Cir. 2009), ECF No. 005195633.[8] In doing so, he made a specious argument to distinguish the circumstances of Petitioner's case. *Id.* at 16.

Respondent's decision to break Texas' promise to Petitioner is extraordinary, and demands correction, for three reasons. First, Texas' backtracking deviates from the primary responsibility of all prosecutors to seek justice, and to faithfully adhere to the U.S. Constitution. Second, the justice system as a whole suffers when a prosecutor makes a promise to a defendant to excercise prosecutorial discretion in order to comply with its ethical obligations and duties, but then breaks that promise. Third, Texas' decision was arbitrary and has resulted in an uneven application of the law.

A. The Decision to Reverse Attorney General Cornyn's Promise is Inconsistent with Prosecutorial Ethics

While serving as Attorney General of the United States, Justice Jackson famously observed that prosecutors' offices "are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done."

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[8] Hereinafter "Appealability Opp'n."

Robert H. Jackson, U.S. Att'y Gen., The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940) ("Jackson Address") Justice Jackson's words reflect the immense power and consequent potential for abuse that prosecutors wield in the American justice system. Prosecutors must not simply seek convictions—they are obliged to seek justice and protect the fairness of judicial proceedings. *See United States v. Williams*, 504 U.S. 36, 62 (1992) (Stevens, J., dissenting) (noting a "prosecutor's duty to protect the fundamental fairness of judicial proceedings"); *see also* 1991 NPS, R. 25 cmt. (2d ed. 1991) ("It has long been recognized that the responsibility of the prosecutor goes beyond simply seeking indictment and conviction. The duty of the prosecutor is to seek justice, not merely to obtain a conviction.") Like all other prosecutors in Texas, the Attorney General has the duty to "assure that a fair and fully informed judgment is made and that unfair sentences and unfair sentence disparities are avoided." NPS 7-1.1.

The decision to reverse Attorney General Cornyn's promise was premised entirely on the notion that Petitioner's case was distinguishable from *Saldaño* and others "because Buck himself—not the State—offered Dr. Quijano's testimony into evidence." Appealability Opp'n at 16. That argument is both unsound and unprincipled. First, the argument ignores that the prosecution elicited the very same improper testimony on cross-examination and then urged the jury to rely on the expert's testimony in closing. It was improper for the Attorney General to advance an argument so plainly at odds with the record in an effort to justify his

decision to reverse course. Second, the argument ignores that certain of the other defendants who received relief under Attorney General Cornyn's action had also called Dr. Quijano as a witness. *See Buck v. Thaler*, 132 S. Ct. 32 (2011) (Sotomayor, J., dissenting) ("Like Buck, the defendants in both *Blue* and *Alba* called Quijano to the stand."). Third, the argument utterly sidesteps the need to remedy the error of Petitioner's constitutionally-deficient attorney, who elicited this testimony in the first instance.

The Attorney General's decision ensured that Petitioner would not be sentenced in a manner consistent with the five other similarly-situated defendants whose sentences also were tainted by Dr. Quijano's testimony. That decision is at odds with the "trust in the prosecutor" as "the representative of a sovereignty . . whose interest . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (ellipses in original) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

B. The Texas Attorney General's Decision to Reverse the Position of his Predecessor Violated the Public Trust in Evenhanded Administration of Justice

The decision of the Attorney General of Texas to renege on his predecessor's position poses special threats to the integrity of the justice system and underscores the impropriety of the Fifth Circuit's denial of a certificate of appealability. Criminal defendants, and particularly capital defendants, have a right to expect that their cases will be treated evenhandedly and consistently. The ideological

predispositions of the Attorney General or the U.S. Attorney on a given case should not dictate the availability of fundamental constitutional protections. In fact, any perception that a change in office leadership was the dispositive factor in a charging or sentencing decision is corrosive to the impartiality on which public confidence in the justice system is based.

The justice system demands that prosecutors uphold the commitments that they make to criminal defendants. Prosecutors are officers of the court, and the representations that prosecutors make carry the authority of the state. *See United States v. Hasting*, 461 U.S. 499, 522 (1983) (explaining that "Government prosecutors" are "officers of the court charged with upholding the law"). It is reasonable to hold prosecutors to those promises when dealing with criminal defendants. As such, courts have vacated and invalidated guilty pleas where they have been elicited based upon false promises. *See, e.g., Santobello v. New York*, 404 U.S. 257, 262 (1971) (concluding "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made" will be best served by vacating judgment).

That Texas made its decision following a change in the leadership of the Attorney General's Office only worsens the problem. The credibility of prosecutors as participants in the justice system requires a knowledge of and respect for institutional precedent. *See id.* ("The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' *or has done*." (emphasis added)). For example, U.S. Attorney's Offices regularly consult, study, and cite

historical office practice before making charging decisions, negotiating plea agreements, or advancing legal positions in the trial or appellate courts. *See* Memorandum from Eric J. Holder Jr. to All Federal Prosecutors, Department Policy on Charging and Sentencing (May 19, 2010), *available at* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf (last visited Jul. 31, 2016) ("With respect to charging decisions, plea agreements, and advocacy at sentencing, the mechanisms established for obtaining supervisory approval should be designed to ensure, as much as possible . . . district-wide consistency. Supervisory attorneys selected to review exercises of discretion should be skilled, experienced, and thoroughly familiar with Department and district-specific policies, priorities, and practices."); *see also* U.S. Dep't Of Justice, U.S. Attorneys' Manual § 9-27.130 (2014), https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.130 (explaining that one of the purposes of establishing office procedures is "to ensure consistency in the decisions within each office . . . ."). Those precedents help promote uniformity in charging and sentencing decisions, and also help promote accountability in how justice is administered in both federal and state governments.

If prosecutorial decisions are haphazardly cast aside everytime the leadership of a prosecutor's office changes, the public and judiciary will lose confidence in the impartiality of prosecutors. *See Santobello*, 404 U.S. at 262 (explaining that government breach of plea agreement cannot be excused because subsequent prosecutor was

unaware of agreement); Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors Appearances to the Mind Are of Four Kinds. Things Either Are What They Appear to Be; or They Neither Are, Nor Appear to Be*, 63 Mo. L. Rev. 699, 703, 732 (1998) ("Because the prosecutor's actions affect not only the individual criminal case but also the system as a whole, the prosecutor must be concerned with both the propriety of her actions and the appearance of those actions. . . . As a quasi-judicial officer and a minister of justice, the prosecutor affects public confidence in the legal system.") In cases like this, where "[w]e are provided with no explanation for why the State declined to act consistently with its Attorney General's public announcement with respect to Appellant Buck," *Buck v. Thaler*, 452 F. App'x 423, 433 n.41 (5th Cir. 2011), the public is left to assume that the justice system is arbitrary. As Attorney General Cornyn correctly stated: "The people of Texas want and deserve a system that affords the same fairness to everyone." June 9 Statement.

The integrity of the justice system demands that prosecutors be held to their promises to criminal defendants. To depart from such a promise is indeed extraordinary, and a departure with life or death consequences for a defendant warrants close judicial scrutiny.

C. Texas' Decision Results in Arbitrary and Uneven Justice

Texas' current decision to oppose Petitioner's request for a new sentence is arbitrary because it applies disparate treatment to similarly-situated

defendants. It is, of course, unjust for "virtually identically situated litigants [to be] treated in a needlessly disparate manner. . . ." *Roper v. Weaver*, 550 U.S. 598, 601 (2007). As discussed *supra*, with the exception of this case, in every other case in which Dr. Quijano's prejudicial testimony was offered, the State kept its promise to waive all procedural defenses and conceded that Dr. Quijano's testimony demanded new sentencing hearings.

Texas has claimed that its refusal to abide by its promise is not arbitrary because Petitioner's ineffectiveness claim was foreclosed by state habeas counsel's default of that claim, and because Petitioner's case "present[ed] a strikingly different scenario than that presented in *Saldaño*—Buck himself, not the State offered Dr. Quijano's testimony into evidence." Resp't Dretke's Answer and Mot. for Summ. J. with Br. in Supp. at 17, 21 25, *Buck v. Stephens*, No. 4:04-cv-03965 (S.D. Tex. Sept. 6, 2005) ECF No. 6 (hereinafter, "Respondent's Answer"). Both of these arguments fail.

With respect to default, the Fifth Circuit rejected the argument that the Attorney General's failure to honor its commitment to waive procedural default defenses constituted an "extraordinary circumstance." *Buck v. Stephens*, 623 F. App'x 668, 673-74 (5th Cir. 2015). Such a conclusion cannot be squared with the Fifth Circuit's own statement that this broken promise presented an "odd and factually unusual" circumstance. *Id.* It is unclear why an "odd and factually unusual" action is not extraordinary under the Fifth Circuit's reasoning. Indeed, Attorney General Cornyn's initial acknowledgement that Petitioner had been sentenced in violation of the Constitution and that Texas would therefore not bar

Petitioner's meritorious request for a new sentence on the basis of any procedural default is, itself, extraordinary. If the subsequent reversal of this promise, for specious reasons, does not constitute "extraordinary circumstances," then the standard is too strict to provide any meaning.

Moreover, Petitioner's case is not meaningfully different from those cases in which Texas abided by its prior agreement. "Like Buck, the defendants in both *Blue* and *Alba* called Quijano to the stand." *Buck*, 132 S. Ct. at 37 (Sotomayor, J., dissenting). And contrary to Texas' representation, the prosecutor at Petitioner's sentencing did indeed elicit the same testimony, and returned to it in her closing. Tr. at 260:13-21, ECF No. 5-117. Indeed, because Texas waived its procedural defenses in every other case involving Dr. Quijano's testimony, Petitioner is the only individual in Texas facing execution on the basis of racially-biased expert testimony.

As a consequence, Texas' decision cannot be squared with the prosecutorial duty to seek justice. That duty requires a non-arbitrary application of the law—especially in capital cases. *DeGarmo v. Texas*, 474 U.S. 973, 975 (1985) (Brennan, J., dissenting) ("[W]here death is the consequence, the prosecutor's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (internal citations and quotation marks omitted)).

In this case, Texas lacks a legitimate interest in the finality of this judgment. Texas has already determined that cases similarly-situated to *Saldaño* were constitutionally-deficient and that it was

necessary to reverse the finality of these judgments to uphold the Constitution, respect the rule of law, and preserve the public's faith in the criminal justice system. Texas cannot credibly claim an interest in the finality of petitioner's sentence of death where its own Attorney General publicly stated that this sentence violated the Constitution because it permitted the consideration of racially-biased testimony. No "societial interest" can exist in "permitting the criminal process to rest at a point where it ought to never to repose." *Welch v. United States*, 136 S.Ct. 1257, 1266 (2016) (internal quotations omitted).

In sum, the Texas Attorney General's reversal of its prior position was extraordinary. The decision erodes the public perception that prosecutorial decisions are evenhanded and impartial, and accordingly undermines the integrity of the office. This Court should not allow such unjust and unequal results. *See United States v. Chavez*, 416 U.S. 580, 599 (1974) (Douglas, J., concurring in part) (acknowledging "the duty of this Court to nourish and enhance respect for the evenhanded application of the law"); *see also Breed v. Jones*, 421 U.S. 519, 527 (1975) (discussing "our concepts of basic, even-handed fairness." (internal citations and quotation marks omitted)).

CONCLUSION

This Court should reverse the Fifth Circuit's denial of Petitioner's petition for a Certificate of Appealability.

Respectfully submitted,

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August 4, 2016

APPENDIX

APPENDIX OF AMICI CURIAE

William Broaddus: Attorney General of Virginia (1985-1986); Assistant Attorney General, Virginia (1970-1973); County Attorney, Henrico, Virginia (1973-1982); Chief Deputy Attorney General, Virginia (1982-1985)

A. Bates Butler III: United States Attorney, District of Arizona (1980-1981); First Assistant United States Attorney, District of Arizona (1977-1980); Deputy Pima County, Arizona Attorney, (1970-1977)

W. J. Michael Cody: Attorney General of Tennessee (1984-1988); United States Attorney, Western District of Tennessee (1977-1981)

Tim Cole: Assistant District Attorney, 271st District of Texas (2010-2014); District Attorney, 97th District of Texas (1993-2006)

W. Thomas Dillard: United States Attorney, Northern District of Florida (1983-1987); United States Attorney, Eastern District of Tennessee (1981); Assistant United States Attorney, Eastern District of Tennessee (1967-1976 and 1978-1983); United States Magistrate for the Eastern District of Tennessee (1976-1978)

Mark Earley: Attorney General of Virginia (1998-2001); Virginia State Senator (1988-1998); CEO/President, Prison Fellowship Ministries (2002-2010)

Rufus Edmisten: Attorney General of North Carolina (1974-1984)

John Gallo: Assistant United States Attorney, Northern District of Illinois (1989-1996)

Linda S. Hood Geffin: Assistant District Attorney, Harris County, Texas (Second chair prosecutor in *State v. Buck*) (1990-2000)

Brooks Harrington: Assistant United States Attorney, District of Columbia (1978-1983)

Scott Harshbarger: Attorney General of Massachusetts (1991-1999); District Attorney, Middlesex County, Massachusetts (1983-1991)

Glenn Ivey: State's Attorney, Prince George's County, Maryland (2003-2011); Assistant United States Attorney for the District of Columbia (1990-1994)

Grant Jones: District Attorney, Nueces, Kleberg and Kenedy Counties, Texas (1983-1991)

Gerald Kogan: Chief Justice, Supreme Court of Florida (1996-1998); Associate Justice (1987-1996); Judge, Eleventh Judicial Circuit of Florida (1980-1987); Assistant State Attorney (including Chief Prosecutor, Homicide and Capital Crimes Division), Dade County, Florida (1960-1967)

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Supreme Court of the United States

DUANE EDWARD BUCK,

Petitioner,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF PETITIONER

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INTERESTS OF THE *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. The principal mission of the Lawyers' Committee is to secure equal justice for all through the rule of law. The Lawyers' Committee frequently appears before the Court either representing parties or as an amicus. On criminal justice issues, the Lawyers' Committee served as counsel in *Chambers v. Mississippi*, 410 U.S. 284 (1973), where the Court found that Mr. Chambers, who had been convicted of murder, had been deprived of a fair trial. The Lawyers' Committee also helped bring *O'Shea v. Littleton*, 414 U.S. 488 (1974), which accused law enforcement officers of refusing to prosecute white residents who had committed race-based hate crimes, and instead harassed civil rights demonstrators by arresting them and charging them with crimes unwarranted by the facts.

Currently, the Lawyers' Committee works at the intersection of criminal justice and civil rights on issues such as fighting mass incarceration, ending

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[1] All parties have consented to the filing of this brief. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

the school-to-prison pipeline, and promoting access to employment for people with criminal records. As part of this work, the Lawyers' Committee currently convenes the Civil Rights Coalition for Police Reform. The Lawyers' Committee has an interest in the present case because it raises fundamental questions about the use of explicitly race-based testimony in determining whether jurors impose a death sentence.

SUMMARY OF ARGUMENT

Throughout American history, black Americans have been subject to prejudices about their likelihood to commit crimes, with a corresponding wide variety of criminal laws that explicitly or implicitly targeted them. In America's colonial and antebellum periods, these laws often expressly differentiated between blacks and whites on the basis of race, intentionally distinguishing between presumptively innocent white Americans and enslaved blacks. Legal and extra-legal processes after the Civil War continued to treat blacks as criminal, culminating with solidification of Jim Crow laws designed to keep blacks in their subservient place.

The disparate racial treatment to which blacks have been subjected historically—buttressed by express assertions of black criminality—has created an unfortunate and inaccurate archetype of the violent black criminal. This archetype so permeates the American psyche that it subconsciously warps collective and individual perspectives regarding black Americans, a phenomenon psychologists term "implicit racial bias." Researchers have demonstrated that most Americans harbor an

implicit belief that blackness and criminality are linked, and that this link influences their decisions and behaviors—including jurors' views when making death penalty determinations. And both this Court and numerous Courts of Appeals have repeatedly recognized that unconscious, discriminatory stereotypes can play a major role in decision making.

These psychological dispositions can be brought to the fore and magnified by exposure to racially-tinged triggers, a process known as "priming." Priming reminds the human mind of its implicit associations and invites recipients to follow the well-worn paths those implicit associations have formed.

Implicit biases and priming have a particularly profound impact when invoked by an expert witness. This is because expert witnesses occupy a sensitive position in the criminal justice system, functioning as authority figures who direct a jury based on their expertise. As a result, juries are likely to obey their suggestions rather than evaluate them dispassionately.

In Mr. Buck's case, history, biases, priming, and expert credibility combined in Mr. Quijano's "expert" testimony. Building on centuries of racial prejudice, Mr. Quijano's testimony primed jurors to follow their implicit biases in finding that Mr. Buck was likely to be dangerous in the future because of his race. Because Mr. Quijano's status as an expert for the defense amplified the effect of his testimony, it is unsurprising that the jury exercised its considerable discretion consistent with his statements. This Court should hold that defense counsel's decision to introduce this unduly prejudicial testimony against

his own client, Mr. Buck, constitutes an extraordinary circumstance under Federal Rule of Civil Procedure 60(b).

ARGUMENT

I. THE HISTORICAL BACKGROUND OF THE BLACK CRIMINAL STEREOTYPE

A. Colonial and Antebellum Disabilities for Blacks

America's peculiar institution of slavery is the starting point for understanding modern views and stereotypes concerning black Americans' purported propensity to commit crime. *See generally* Ira Berlin, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA (2d ed. 2000). Slavery both required and cultivated systemic penalization of blackness. Colonial and antebellum legal codes provide a tainted foundation for the stereotype of black as criminal and future generations' understandings of black criminality.

As former Third Circuit Judge A. Leon Higginbotham Jr. explained, "[d]uring the colonial and antebellum periods, one did not have to study sentencing patterns of trial judges to ascertain whether judges were imposing far more severe sentences on blacks than on whites for the same crime; most often, the legislation blatantly required more severe sentences for blacks." A. Leon Higginbotham, Jr. and Anne F. Jacobs, *The 'Law Only as an Enemy': The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 1021-22 (1992) (hereafter Higginbotham). Explicitly discriminatory statutes were often justified by

stereotypes of blacks as savage and not fully human. For example, when South Carolina passed its first comprehensive slave code in 1712, its stated reason was that "the said negroes and other slaves brought unto the people of this Province . . . are of barbarous, wild, savage natures, and such as renders them wholly unqualified to be governed by the laws, customs, and practices of this Province." A. Leon Higginbotham, Jr., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD 167 (1978) (hereafter Matter of Color) (quoting 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 352 (Thomas Cooper and David J. McCord, eds.) (1836-41)).

Disparate laws were also commonly justified by stereotypes that slavery was necessary to combat blacks' inherent state as inferior, stupid beings. As one anti-abolitionist pamphleteer explained in the 1830s, it was self-evident "that the negro is constitutionally indolent, voluptuous, and prone to vice, that his mind is heavy, dull, and unambitious; that the doom that has made the African in all ages and countries, a slave—is the natural consequence of the inferiority of his character.'" Khalil Gibran Muhammad, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 21 (2010) (quoting William Drayton, THE SOUTH VINDICATED FROM THE TREASON AND FANATICISM OF NORTHERN ABOLITIONISTS (1836)) (hereafter Condemnation of Blackness); *see also id.* at 22-23 (referencing attempts to find biological justifications for black inferiority throughout the nineteenth century).

Stereotypes of black Americans as criminal and dangerous were further strengthened through enactment of long lists of capital crimes applicable solely to blacks. One commentator immediately prior to the Civil War estimated that Virginia had "sixty-eight crimes for which slaves might receive the death sentence as compared to only one, first-degree murder, for which whites could be put to death." Higginbotham at 1022 (citing George M. Stroud, A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA 77-80 (1856) (photo reprint 1968)). Georgia similarly enacted numerous capital crimes that applied only to slaves and, in some instances, free blacks or American Indians. Matter of Color at 256-57 (detailing examples); *see also id.* at 262-63 (additional capital crimes in Georgia in 1765 and 1770 statutes); *McClesky v. Kemp*, 481 U.S. 279, 329-30 (1987) (Brennan, J., dissenting) (discussing Georgia capital crimes applicable only to blacks as of 1861). Other states similarly authorized death only for blacks who committed certain crimes. *See* Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 99 (Charles J. Ogletree, Jr. and Austin Sarat eds. 2006) (hereafter Traces of Slavery) (examples from Texas, Florida, Louisiana, Mississippi, South Carolina, and Tennessee).

Predictably, execution rates tracked these disparities. Some half of the blacks (but no whites) executed in Virginia between 1800 and 1860 were hanged for crimes other than murder. *Id.* In Louisiana, the number of blacks executed for crimes

other than murder was actually higher than those executed for homicides. *Id.* at 99. Again other states were similar. *Id.* at 99-100 (examples). In combination, pre-Civil War statutes and their implementation demonstrated a belief that blacks required strenuous punishment while providing frequent, visible reminders of black criminality.

Besides laws that facially treated blacks and whites differently and were indicative of perceived dangerousness, numerous procedural disadvantages also reflected a belief in black untruthfulness and criminality. For instance, a 1732 Virginia statute explained that blacks' trial testimony was limited because their "base and corrupt natures meant that their testimony cannot certainly be depended upon." Higginbotham at 995 (quoting Act of May 1732, ch. VII § V, in 4 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 327 (William W. Hening ed. 1819-23)); *see also* Matter of Color at 180-81 (South Carolina slave testimony generally only admissible if attended by independent indicia of reliability); *id.* at 282 (Pennsylvania free blacks barred from testifying against whites until 1780).

Similarly, the perception that accused blacks were guilty justified elimination of procedural protections considered vital for white defendants in many jurisdictions. As early as 1692, Virginia explained that the right to jury trial for slaves in capital cases was "unnecessary to secure substantial justice." Higginbotham at 985 (citation omitted). It instead substituted trial by local justices of the peace. *Id.* at 984-86; *see also id.* at 992 (unanimous verdicts not

even required in late 1700s); Matter of Color 179-80 (similar slave courts, South Carolina after 1712); *id.* at 257-58 (Georgia after 1755); *id.* at 281-82 (Pennsylvania from 1700 to 1780). Nor did many colonial justice systems perceive any reason to provide slaves convicted of capital crimes with appeals. Prior to 1833, for instance, judgments against slaves and free blacks in South Carolina were carried out more or less summarily. *Id.* at 180 (citing black horse thief captured on Sunday, tried on Monday, and hanged at noon on Tuesday). And the same Virginia 1692 statute that established justice of the peace slave courts also eliminated appellate rights. Higginbotham at 997-98; *see also Peter, a Slave v. Commonwealth*, 4 Va. 330, 331 (1823) (rejecting appeal of slave convicted of murder as "novel"); *but see In re Elvira, a Slave*, 57 Va. 561 (1865) (Virginia slave finally allowed appeal in last months of Civil War).

B. Black Criminality Under Jim Crow

Following the Civil War, Southern opposition to integrating former slaves and their descendents as full, equal citizens meant that society continued to impose legal and extra-legal disabilities on blacks. These legal barriers again strengthened the stereotype of black Americans as dangerous and more likely to commit crimes.

Such views received a boost as statisticians digested the 1890 federal census, a "crucial milestone" in demographic information because of improvements in data gathering techniques and the twenty-fifth anniversary of the Civil War and subsequent emancipation. Condemnation of Blackness 31. Unfortunately, influential

contemporaneous discussion of this data tended to interpret black crime as a function of racial dangerousness, rather than the product of complex social, economic, educational, and enforcement variables. *Id.* at 50-51, 54. As a leading statistician claimed at the time, the data "'show[ed] without exception that the criminality of the negro exceeds that of any other race of any numerical importance in this country.'" *Id.* at 51 (quoting Frederick L. Hoffman, RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO 228 (1896)). This statistics-based analysis lent apparent mathematical precision to prior views of black criminality. *But see id.* at 57 (noting limited contemporaneous cautions from white scholars regarding these conclusions); *id.* at 62-66 (same; black scholars Kelly Miller and W.E.B. Du Bois). By the 1920s, "[r]ace-relations writers had inscribed criminality onto nearly every aspect of black people's existence." *Id.* at 93.

These beliefs about black criminality mirrored and justified society-wide discrimination as Southern states returned fully to local white control following Reconstruction. *See, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445–47 (1968) (Douglas, J., concurring) (listing a "brief sampling" of the many "badges of slavery" that persisted long after abolition). Even as states removed explicit discrimination from their laws, they managed to suppress civil rights of blacks through new laws aimed at maintaining white supremacy in spite of their facial neutrality. For instance, black voter registration and turnout plummeted as states passed new voting laws imposing prerequisites that blacks often could not meet or vesting discretion in

registrars who frequently used it to disenfranchise blacks. *See* Michael Klarman, FROM JIM CROW TO CIVIL RIGHTS 32 (2004) (hereafter Klarman) (statistics of drastic voting reductions in 1890s). In turn, black officeholders disappeared at all levels of government. *Id.* This disenfranchisement made exclusion of blacks from juries a simple step. *Id.* at 38-39. The discriminatory discretion vested in voter registrars was similarly reflected in the convict-leasing regimes some states enacted. Blacks were convicted of highly discretionary petty crimes, like vagrancy, riding freight cars without a ticket, or talking with white women, and sentenced to hard labor or leased to corporations until they could pay off court fees. *See* Douglas A. Blackmon, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008).

At times even this Court's own opinions reflect the broad array of discriminatory laws enacted—and sometimes affirmed. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding statute requiring separate railroad accommodations); *Williams v. Mississippi*, 170 U.S. 213 (1898) (upholding subjective Mississippi voting literacy test and grandfather clause effectively exempting illiterate whites); *Cumming v. Richmond Cnty. Bd. of Educ.*, 175 U.S. 528 (1899) (upholding decision to close black high school); *Berea Coll. v. Kentucky*, 211 U.S. 45 (1908) (upholding law prohibiting desegregated college).

Substantive criminal law again reflected this discrimination and strengthened the stereotype of blacks as dangerous. Many of the same crimes that

Southern states previously made capital only for blacks remained capital nearly one hundred years later. As late as 1954, rape, robbery, arson, and burglary remained capital offenses in many Southern states, even as the North abolished them. Traces of Slavery 101 (listing states).

While states technically no longer applied these statues by race, in practice death sentences "were imposed disproportionately on black defendants." *Id.* Between 1870 and 1950, 701 of the 771 people of identifiable race executed for rape in the South were black. *Id.* at 107. Thirty-one of the thirty-five people executed for robbery and eighteen of the twenty-one executed for burglary in the same period were black. *Id.* Even for murder, where disparities were smaller, blacks outnumbered whites 217 to 57 in Virginia and 301 to 135 in Texas. *Id.* In other words, while whites were still convicted for these offenses, blacks were disproportionately viewed as worthy of death. Such disparities, in turn, essentially communicated that rapists, robbers, burglars, and murderers were black, strengthening stereotypical beliefs.

Worse, the presumption of black guilt was so strong that blacks were often assumed guilty and executed with only the barest pretense of a trial. *Id.* at 106. For instance, a black man convicted of raping a white woman in Kentucky in 1906 was hanged only fifty minutes after the jury was sworn, while the same year a black defendant in Texas went from indictment to hanging in under four hours. *Id.*; *see also Moore v. Dempsey*, 261 U.S. 86, 89 (1923) (mob-dominated trial of five black murder defendants that "lasted about three-quarters of an hour" with a five-minute jury deliberation); *Powell v. Alabama*, 287

U.S. 45, 51 (1932) (Scottsboro Boys case; single-day trials for seven black youths accused of raping two white girls conducted under militia guard due to mob threats); *Brown v. Mississippi*, 297 U.S. 278, 279 (1936) (black murder defendants tortured into confession arraigned four days after the murder occurred, tried the following day, and found guilty on the next).

And many blacks accused of crimes never had even the farce of a trial. Lynchings in the late nineteenth and early twentieth century further strengthened the association of blacks as criminal. In the 1890s, lynching exploded across the South. *See, e.g.*, David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC'Y REV. 793, 793-94 (2005) (hereafter Garland). During that period, lynchings peaked at an average of 187.5 per year before dropping to an average of 92.5 in 1900-1909, 61.9 from 1910-1919, 46.2 in the first half of the 1920s, and 16.8 in the second half. Klarman at 118-19. In at least some states, known lynchings actually outnumbered executions. *See, e.g.*, Traces of Slavery 107 (229 executed in Kentucky between 1865 and 1940, while 353 lynchings occurred).

But the numbers alone do not tell the whole story. Lynchings often were highly public affairs involving large numbers of every-day citizens. Garland at 803. These public lynchings likely had many purposes, from vengeance to racial control to opposition to civil rights, *id.* at 819-28, but they were also a form of entertainment. *Id.* at 825 (noting contemporaneous references to "Lynching bees," "Negro barbecues, and "lynch carnivals"). Participants and observers at

public lynchings were photographed smiling and laughing with the tortured bodies of black victims. *See* James Allen et al., WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA (2000) (early twentieth century photographs and postcards of lynching victims); *see also, e.g., id.* at Plate 57 (smiling children observing lynch victim); *id.* at Plates 42-43 (front and back photographs of live, naked lynching victim standing on wagon before crowd, showing significant wounds from lashing); *id.* at Plate 44 (same victim hanged from tree, with blanket tied around loins). In some instances, individuals even sent greeting cards bearing images of lynchings through the U.S. mail to friends and family. *See, e.g., id.* at Plates 54-55.

And even when lynching was criticized, at least some argued that lynching was improper because it brought whites down to the same presumed level of criminality as blacks. Thus one journalist noted in 1905 that "[t]he man who joins a mob, by his very acts, puts himself on a level with the negro criminal: both have given way to brute passion." Condemnation of Blackness at 29 (citation omitted). Under this view, while lynching was an evil, the wrong was at least in part that "the white man becomes as savage as the negro." *Id.* Such perspectives illustrate the "deep and sorry vein of racial prejudice that has run through the history of criminal justice in our Nation," *Calhoun v. United States*, 133 S. Ct. 1136, 1136 (2013) (Sotomayor, J., statement respecting the denial of certiorari).

II. THE PSYCHOLOGICAL IMPACT OF STEREOTYPES OF "BLACK AS CRIMINAL"

Unfortunately, the racial baggage of the United States is embedded in the American psyche, where it continues to influence the ways people interpret their surroundings. As the National Black Law Students Association details in its *amicus* brief in this case, psychological research demonstrates that people today continue to equate blackness with criminality and dangerousness on a subconscious level. These views, particularly when triggered by racially-tinged suggestions, can have a dramatic impact on decision making, including jurors' views when making death penalty determinations.

A. The Impact of Unconscious Stereotypes in Decision Making

Research demonstrates that the stereotype of blacks as criminal so permeates the public mindset that approximately 70 percent of Americans harbor implicit racial bias against black Americans. Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 11 tbl.2, 12 (2007). This is not to say that these Americans are explicitly racist; an individual may have completely different implicit associations and explicit attitudes about the same subject. *See, e.g.*, John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62 (2002).

Given the long history of the stereotype of blacks as criminal, it is not surprising that one of the strongest implicit racial biases is that between blackness and criminality, violence, aggression, and

danger. *See, e.g.*, Heather M. Kleider et al., *Looking Like A Criminal: Stereotypical Black Facial Features Promote Face Source Memory Error*, 40 MEMORY & COGNITION 1200 (2012); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004).

This Court has repeatedly recognized that unconscious, discriminatory stereotypes impact decision making. Just last year this Court noted the role that "covert and illicit stereotyping" might play in housing decisions. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (2015). Similarly, *Price Waterhouse v. Hopkins* considered evidence of unconscious stereotyping and found it played a role in the defendant employer's decision not to promote the plaintiff. 490 U.S. 228 (1989). Members of this Court have also recognized the role unconscious stereotypes play in jury situations. Justice Breyer noted in *Miller-El v. Dretke*, which involved prosecutor discretion in striking jurors, that "[s]ubtle forms of bias are automatic, unconscious, and unintentional and escape notice, even the notice of those enacting the bias." 545 U.S. 231, 268 (2005) (citations omitted). And in *Georgia v. McCollum*, Justice O'Connor similarly observed that, "[i]t is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence." 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting).

Lower courts have also recognized the role that unconscious stereotypes play in decision making. In

considering whether a warrantless stop of a person based on his "Hispanic appearance," was reasonable, the Ninth Circuit recognized that "racial stereotypes often infect our decision making processes only subconsciously." *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1450 (9th Cir. 1994). The Seventh Circuit likewise noted that "stereotyping and unconscious bias is not limited to one particular area of society... There is no reason to believe that a jury would be immune to those racial stereo-types in determining credibility or analyzing motives." *United States v. Stephens*, 421 F.3d 503, 515 (7th Cir. 2005). Lower courts have also noted the role that unconscious biases can play in decisions regarding hiring, firing, promotions and pay in the employment arena. *See, e.g., Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 42 (1st Cir. 1999) ("Title VII's prohibition against 'disparate treatment because of race' extends both to employer acts based on conscious racial animus and to employer decisions that are based on stereotyped thinking or other forms of less conscious bias") (emphasis added); *EEOC v. Inland Marine Indus.*, 729 F.2d 1229, 1232 (9th Cir. 1984) (affirming lower court finding that company was responsible for maintaining "a two-tiered wage structure" based on race, despite the fact that "[t]he company did not consciously set out to establish" such a structure).

B. The Impact of Implicit Racial Bias on the Criminal Justice System

Implicit racial biases have direct, real-world consequences at every stage of the criminal justice system, including arrests, trial, and sentencing. *See* John Tyler Clemons, Note, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial*

Disparity in the Criminal Justice System, 51 AM. CRIM. L. REV. 689, 694 (2014); Joshua Correll et al., *The Police Officers' Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314 (2002). Most pertinently for the present case, numerous empirical studies have demonstrated the impact of implicit racial bias on the kinds of decisions that jurors make during trial and sentencing.

Stereotypes can affect what a juror remembers from trial during subsequent deliberations. For instance, in one experiment, researchers had participants read a story about a fight featuring either a black actor, a Native Hawaiian actor, or a white actor. Justin Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 319 (2010) (citing Justin D. Levinson, *Suppressing the Expression of Community Values in Juries: How "Legal Priming" Systematically Alters the Way People Think*, 73 U. CIN. L. REV. 1059 (2005)). Participants who read the story featuring a black American "remembered his aggressive actions better than [other] participants" and, in some instances, participants reading about a black actor "possessed false memories of the African American actor acting aggressively." *Id.* Furthermore, researchers have found that simply changing the skin tone of a perpetrator in a surveillance camera photo makes participants more likely to judge different pieces of evidence from a trial as indicative of guilt. *Id.* at 310.

These views carry through trial to criminal sentencing as well. In addition to demonstrating

that individuals are more likely to believe black defendants are guilty, researchers have found that implicit racial bias makes individuals believe blacks are more dangerous, aggressive, and unrepentant at sentencing. *See* Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 LAW & HUM. BEHAV. 621 (2005); *see also* Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010); Irene V. Blaire et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674 (2004). When jurors face high-stakes decisions about defendants' fates in death penalty cases, they implicitly interpret stereotypically black features as cues to deathworthiness. Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383, 385 (2006).

C. Racial Priming As Trigger for Racial Stereotypes

As dangerous as implicit racial stereotypes may be on their own, studies also recognize that such stereotypes can be exacerbated through a psychological triggering phenomenon known as priming. Priming occurs when "subtle influences . . . increase the ease with which certain information comes to mind." Richard H. Thaler & Cass R. Sunstein, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS 69 (2009).

Numerous experiments have shown that priming an individual with race-based stereotypes can significantly influence later decisions by that

individual. For instance, in one experiment, researchers subliminally exposed police officers and juvenile probation officers to either a set of words related to blackness (such as "graffiti," "pimp," "dreadlocks," "Oprah," "plantation," or "reggae") or a set of mostly neutral words (such as "baby," sunset," "funeral," "stress," "paralysis," or "laughter"). Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 489 n.5 (2004) (listing words used). The researchers then had the officers read two hypotheticals about either an incident involving shoplifting or an assault. No information regarding the offender's race was given. The officers were then asked to rate "the hypothetical offender on... expected recidivism, and deserved punishment." *Id.* at 487. Officers who had been primed with race-cued words "reported more negative trait ratings, greater culpability, and expected recidivism, and [ ] *endorsed harsher punishment* than did officers in the neutral condition." *Id.* at 504 (emphasis added); *see also* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 5 J. PERSONALITY & SOC. PSYCHOL. 5-18 (1989) (participants primed with words having stereotypic associations with African Americans more likely to judge an individual exhibiting ambiguous behavior as hostile than unprimed participants).

The specific method of priming appears to matter less than the fact that the prime is given. For instance, researchers found that participants who were primed by listening to rap music were more likely to later "rate[ ] a Black male's violent behavior as being more character-based" than participants

who were not primed by listening to rap music. UNDERSTANDING PREJUDICE AND DISCRIMINATION 27 (S. Plous, ed., 2003) (citing J.D. Johnson, Trawalter, & J.F. Dovidio, *Converging interracial consequences of exposure to violence rap music on stereotypical attributions of blacks*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 233 (2000)). Similarly, researchers have found that "[w]hite television viewers who watch a stereotyped comic portrayal of African Americans are later more likely to judge a Black defendant as guilty of assault." *Id.* (citing Thomas E. Ford, *Effects of Stereotypical Television Portrayals of African-Americans on Person Perception*, 60 SOC. PSYCHOL. Q., 266-75 (1997)).

In other words, while the nature of the prime can differ, the effect of priming individuals with stereotypes of blacks remains consistent. Individuals provided race-based cues concerning blacks are more likely to rely on stereotypes and judge blacks hostile, violent, and unintelligent.

III. EXPERT ENDORSEMENT OF STEREOTYPES EXACERBATES THE RISK OF IMPROPER EXERCISE OF JUROR DISCRETION

The risk of decision making based on priming with implicit racial stereotypes is exacerbated when an expert presents the prime in the discretionary context of jury sentencing. An expert's position of authority in telling jurors how to exercise their considerable discretion renders expert testimony particularly damning in one of the most important moments of jurors' lives—deciding whether a fellow human being is worthy of death.

A. Expert Testimony Based on Race Subverts Jury Deliberations

Racially discriminatory testimony dressed up as expert opinion can readily sway juror decision making. Jurors tend to defer automatically to expert opinion, with jury deliberations especially susceptible to corruption by racial biases.

Ever since Yale University psychologist Stanley Milgram famously showed that subjects will obey instructions from authority figures, even to the point of causing great pain to another person, social science research has repeatedly demonstrated that individuals have a persistent tendency to defer blindly to authority. *See* Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371, 375–76 (1963). [2] Milgram

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[2] In Milgram's experiment, subjects were instructed to administer a series of increasingly high voltage electric shocks to a "learner" (in reality, an actor hired for the experiment) in an adjoining room. The "shocks" were administered at increments starting at 15 ("Slight Shock") and reaching 450 volts ("XXX"). Of the 40 subjects involved, none stopped prior to administering 300 volts ("Intense Shock"), and 26 "obeyed the orders of the experimenter to the end, proceeding to punish the [learner] until they reached the most potent shock available," two steps beyond the designation "Danger: Severe Shock." *See id.* at 375–76; *see also* Emilie A. Caspar et al., *Coercion Changes the Sense of Agency in the Human Brain*, 26 CURRENT BIOLOGY 585 (2016); Charles L. Sheridan & Richard G. King, Jr., *Obedience to*

concluded that obedience to authority is a "deeply ingrained behavior tendency, indeed, a prepotent impulse overriding training in ethics, sympathy, and moral conduct." *Id.* at 371.

Experts are such authority figures. As social psychologists John French and Bertram Raven influentially explained, "expert power" is an important "bas[i]s of social power" that endows those who possess it with disproportionate influence over others. John P. French & Bertram Raven, *The Bases of Social Power*, in STUDIES IN SOCIAL POWER 150 (Dorwin Cartwright ed., 1959). "[E]xpert power" is based on the perception that someone "has some special knowledge or expertness," and it "results in primary social influence on [the person's] cognitive structure," which becomes "relatively dependent on [the expert]." *Id.* at 163, 164. In other words, when presented with the opinion of a perceived expert, individuals cease to think independently and instead rely on the expert to think for them. This insight is supported by multiple studies indicating that decisionmakers reflexively defer to expert advice.[3]

(continued...)

Authority with an Authentic Victim, 80 Annual Convention, APA 165 (1972); Charles K. Hofling et al., *An Experimental Study of Nurse-Physician Relationships*, 143 J. NERVOUS & MENTAL DISEASE 171 (1966).

[3] *See, e.g.*, Silvia Bonaccio & Reeshad S. Dalal, *Advice Taking and Decision-Making: An Integrative Literature Review, and Implications for the*

Indeed, individuals rely on experts to the point that they shut down their own neural decision-making activity. *See, e.g.*, Jan B. Engelmann et al., *Expert Financial Advice Neurobiologically "Offloads" Financial Decision-Making under Risk*, PLOS ONE (Mar. 24, 2009), http://dx.doi.org/10.1371/journal.pone.0004957.

This tendency to defer to expert opinion is heightened when a "novice" decision-maker has limited guidance and wide discretion and is asked to make a difficult decision. *See, e.g.*, Berndt Brehmer & Roger Hagafors, *Use of Experts in Complex Decision Making: A Paradigm for the Study of Staff Work*, 38 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 181 (1986); Francesca Gino & Don A. Moore, *Effects of Task Difficulty on Use of Advice*, 20

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Organizational Sciences, 101 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 127 (2006) (summarizing the literature); Nigel Harvey & Ilan Fischer, *Taking Advice: Accepting Help, Improving Judgment, and Sharing Responsibility*, 70 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 117 (1997); Helmut Jungermann & Katrin Fischer, *Using Expertise and Experience for Giving and Taking Advice*, in THE ROUTINES OF DECISION MAKING 157 (Tilmann Betsch & Susanne Haberstroh eds., 2005); Janet A. Sniezek & Timothy Buckley, *Cueing and Cognitive Conflict in Judge-Advisor Decision Making*, 62 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 159 (1995).

J. BEHAV. DECISION MAKING 21 (2007). The jury room creates precisely this scenario. Juries generally have no special training for their task; they are given enormous discretion; and they are entrusted with making complex and difficult decisions. Capital sentencing juries in particular receive limited guidance while at the same time being required to make the hardest decision of all: between life and death.

In this context, expert testimony is a powerful influence. One key study, for example, found that "psychological expert testimony on the dangerousness of a criminal defendant," including a factor-based risk assessment such as that presented at the sentencing hearing in this case, "significantly influenced mock jurors' decisions on this issue." *See* Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCHOL. PUB. POL'Y & L. 267, 299–301 (2001). Expert testimony blurs the "descriptive/explanatory function of the expert with the evaluative/prescriptive function of the [jury]," increasing the risk that the jury will blindly rely on expert testimony and effectively "abdicate its responsibility to the expert." Mark D. Cunningham, & Thomas J. Reidy, *Don't Confuse Me With the Facts: Common Errors in Violence Risk Assessment at Capital Sentencing*, 26 CRIM. JUST. & BEHAV. 20, 37 (1999).

B. Juror Discretion in Capital Sentencing Aggravates Biased Expert Testimony

The impact of an expert priming a jury with racial stereotypes is further aggravated by the discretionary nature of jury decisions, especially in

capital sentencing decisions. Indeed, this Court has recognized that "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Turner v. Murray*, 476 U.S. 28, 35 (1986); *see also, e.g.*, Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 Mich. St. L. Rev. 573.

By design, jury deliberations are not subject to judicial oversight or public scrutiny. For example, the law prohibits judges from forcing juries to reach a particular verdict, or forcing them to reach a verdict at all. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 462 (1978) (finding reversible error "solely because of the risk that the [jurors] believed the court was insisting on a dispositive verdict"); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 573 (1977) ("The trial judge is . . . barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused."); *Galloway v. United States*, 319 U.S. 372, 407 (1943) (Black, J., dissenting) ("[A] judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function.").

Similarly, it is a "cardinal principle that the deliberations of the jury shall remain private and secret," *United States v. Olano*, 507 U.S. 725, 737 (1993) (internal quotation marks and citation omitted), and both federal and state rules of evidence bar testimony about juror deliberations when offered

to challenge the validity of a verdict. *E.g.*, *Warger v. Shauers*, 135 S. Ct. 521, 526 (2014) (discussing origins of Fed. R. Evid. 606(b)); Ill. R. Evid. 606(b) (barring testimony about juror deliberations when offered to challenge verdict); Ohio R. Evid. 606(b) (same); Tex. R. Evid. 606(b) (same). This confidentiality preserves "full and frank discussion in the jury room, [and ensures] jurors' willingness to return an unpopular verdict"—in other words, it safeguards jurors' discretion to reach a decision free from scrutiny or interference. *Tanner v. United States*, 483 U.S. 107, 120-21 (1987)

Capital sentencing juries possess even greater discretion than guilt-phase juries. To be sure, this Court has mandated that juries must be given guidance when deciding whether to mete out a death sentence. *See Maynard v. Cartwright*, 486 U.S. 356, 362, (1988) ("Since *Furman* [*v. Georgia*, 408 U.S. 238 (1972)], our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action."). But the jury's discretion in determining whether to impose a death sentence remains very broad.[4]

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[4] Indeed, while recognizing the need of capital sentencing juries for some level of guidance, this Court has also held that the discretion of the capital sentencing jury is essential to the just administration of the death penalty. *See Lockett v. Ohio*, 438 U.S. 586, 597-98, 604 (1978) (discussing abandonment of mandatory death penalty scheme

In general, once a jury has found facts rendering a defendant death-eligible, their deliberations during the penalty-selection phase of sentencing are guided only loosely, usually by the court's direction to consider various factors. *See Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994) ("To render a defendant eligible for the death penalty in a homicide case, . . . the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent)."); *California v. Ramos*, 463 U.S. 992, 1008 (1983) ("Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment."). "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision." *Tuilaepa*, 512 U.S. at 979. And selection-phase factors generally do not

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and holding that "the Eighth and Fourteenth Amendments require that the [capital] sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); *Woodson v. North Carolina*, 428 U.S. 280, 295, 304 (1976) (plurality op.) (noting capital jury's function of "maintain[ing] a link between contemporary community values and the penal system" and ensuring that capital defendants are treated "as uniquely individual human beings").

dictate any given answer to the ultimate question of whether a death-eligible defendant will receive a life sentence or be executed. *See Buchanan v. Angelone*, 522 U.S. 269, 275-76 (1998) ("[I]n the selection phase, we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination."); *Zant v. Stephens*, 462 U.S. 862, 875 (1983) (holding that it is constitutionally permissible for "the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute").

This freedom stands in striking contrast to the deliberations of ordinary juries, which are guided by carefully drawn instructions specifying what facts the jury must find to return a guilty verdict. *See Zant*, 462 U.S. at 899 (Rehnquist, J., concurring) (explaining that a guilt-phase jury "decides whether the defendant committed a specific set of defined acts with a particular mental state" and that the "elements [of the crime], each of which is necessary to the verdict of guilty, are specifically and carefully enumerated and defined in the . . . instructions to the jury"); *United States v. Park*, 421 U.S. 658, 674-75 (1975) (discussing the need to focus jury deliberations, through appropriate instructions, on the specified elements of the crime). Thus, while "confronted with evidence and argument on the issue of whether another should die, and . . . asked to decide that issue on behalf of the community," capital juries retain "significant discretion" and receive "only *partial* guidance as to how their judgment should be

exercised." *Caldwell v. Mississippi*, 472 U.S. 320, 333 (1985) (emphasis added).

IV. "EXPERT" QUIJANO IMPROPERLY PRIMED THE JURY THAT MR. BUCK WAS VIOLENT BECAUSE HE WAS BLACK

As demonstrated, many Americans labor under a historical and psychologically-based burden of perceived black criminality. In this case, Mr. Quijano's "expert" testimony reinforced those inaccurate stereotypes and validated the implicit racial biases the jury venire likely brought with them. Worse, rather than presenting a view of Mr. Buck as a complete individual, Mr. Quijano used his authoritative position as an expert to tell jurors that they should exercise their nearly-unlimited discretion to indulge a predisposition that Mr. Buck was a dangerous, violent criminal based on his race. The consequences of Mr. Quijano's testimony threaten our most basic notions of due process. *See Zant*, 462 U.S. at 885 (if "constitutionally impermissible" factors like race were relied upon by a capital sentencing jury, "due process of law would require that the jury's decision to impose death be set aside").

Mr. Quijano's testimony primed the jury to sentence Mr. Buck as a presumptively dangerous black criminal in three explicit ways. First, when Quijano testified on direct examination, he provided testimony more reminiscent of the 1890s than modern America that race was among the "statistical factors in deciding whether a person will or will not constitute a continued danger," and that Blacks and Hispanics are more likely to be dangerous. Sentencing Hr'g Tr. 111:1-4, May 6, 1997, *Buck v.*

Stephens, No. 4:04-cv-03965 (S.D. Tex.), ECF No. 5-114 at 4. Second, on cross-examination Mr. Quijano agreed with the prosecutor's question that "the race factor, black, increases the future dangerousness" of an individual "for various complicated reasons." *Id.* at 160:8-15, ECF No. 5-115, at 17. Third, and perhaps most significantly, the jury requested that Mr. Quijano's expert report be sent to the jury room for consideration. *See* Jury Requests, *Buck*, No. 4:04-cv-03965, ECF No. 5-9 at 4. The request for the report was the last of three notes sent to the court before the jury decided to sentence Buck to death. *Id.* In the final moments of their deliberation then, the jury requested and received a document analyzing future dangerousness with the phrase, "Race. Black. Increased probability. There is an over-representation of Blacks among the violent offenders." 3/8/97 Forensic Psychological Evaluation at 7, *Buck*, No. 4:04-cv-03965, ECF No. 5-118 at 24; *see also Buck v. Thaler*, 132 S. Ct. 32, 33 (2011) (Statement of Alito, J.) (quoting same).

If nothing more than subliminal priming words or rap music are enough to trigger judgment-altering racial stereotypes, Mr. Quijano's explicit and thrice-repeated assertion that blacks present an "[i]ncreased" risk of violence was a far worse prime triggering powerful racial stereotypes. Mr. Buck was entitled to have his dangerousness assessed on an individualized basis based on his personal attributes. Instead he received a death sentence tainted by four hundred years of racial stereotyping invoked by a witness who was supposed to testify on his behalf. *See also Saldano v. State*, 70 S.W.3d 873, 875 (Tex. Crim. App. 2002) (en banc) (noting Texas' confession

of error before this Court in case where Mr. Quijano presented similar testimony on behalf of prosecution). The defense attorney's decision to rely on testimony explicitly prompting the jury's implicit racial biases was an extraordinary circumstance satisfying the requirements of Rule 60(b)(6).

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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Petitioner,

v.

LORIE DAVIS,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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ARGUMENT 6

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INTEREST OF AMICI CURIAE

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The Texas Criminal Defense Lawyers Association is a non-profit, voluntary, membership organization dedicated to the protection of those individual rights guaranteed by the state and federal constitutions, and the constant improvement of the administration of criminal justice in the State of Texas. Founded in 1971, TCDLA currently has a membership of over 3,400 and offers a statewide forum for criminal defense counsel, providing a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases, as well as

seeking to assist the courts by acting as *amicus curiae*.[1]

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[1] Pursuant to Rule 37.6, counsel note that this brief was not authored by counsel for either party, and neither the parties nor their counsel have made any monetary contribution to the preparation or submission of this brief. The law firm of Sidley Austin LLP undertook the printing and filing of this brief on a pro bono basis. The parties have consented to the filing of this brief, and letters reflecting their consent are on file with the Court.

SUMMARY OF ARGUMENT

This Court is "once again" required to examine the question of when a state prisoner may appeal the denial or dismissal of his petition for writ of habeas corpus. *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003). Once again, this Court must provide guidance on the development of unduly restrictive standards, which pre-judge the merits and provide too high a standard for assessing whether reasonable judges might disagree. And once again, if left standing, the Fifth Circuit's decision in this case would help perpetuate the practices of a Circuit that continues to apply too narrow a filter to its consideration of capital habeas corpus cases—despite repeated guidance from this Court.

Numerous jurists—several members of this Court and the dissenting judges in this very case—have expressed concern over the Fifth Circuit's continued abuse of the standard it applies when deciding whether to issue a certificate of appealability ("COA"). *See Jordan v. Fisher*, 135 S. Ct. 2647, 2651-52 (2015); *Buck v. Stephens*, 630 F. App'x 251, 252 (5th Cir. 2015) (Dennis, J., dissenting from denial of rehearing en banc) ("[T]he panel in this case, perhaps unintentionally, followed that prohibited side-stepping process by justifying its denial of a COA based on its adjudication of the actual merits. This is not the first time that a panel of this court has flouted *Miller–El*'s clear command when denying a COA "). These concerns largely fall into two categories.

First, the Fifth Circuit has stepped far beyond the required threshold, conducting a detailed

analysis of the merits before concluding that an individual's constitutional claim failed. *See Miller-El*, 537 U.S. at 542. *See also Jordan*, 135 S. Ct. at 2652 n.2 (collecting cases).

Second, the Fifth Circuit has applied too high a standard in assessing whether reasonable jurists could debate a district court's denial of a habeas petition. Members of this Court have acknowledged this concern in a case where two judges had found the petitioner's claims debatable, and there was a contradictory decision from another circuit "presented with a similar claim in a comparable procedural posture," but the Fifth Circuit nonetheless rejected Jordan's COA application. *Id.* at 2651-52. *See also id.* at 2652 n.2 (collecting cases). So too here: indeed, the Fifth Circuit jumped to an adverse conclusion on an issue that members of this very Court suggested is worthy of a COA.

Both of these errors are present in the petitioner's case. There is no doubt that Mr. Buck demonstrated the kind of "substantial showing of a denial of a constitutional right" to satisfy the threshold inquiry that this Court's precedent indicates is appropriate. *Miller-El*, 537 U.S. at 327 (quoting 28 U.S.C. § 2253(c)(2)). During Mr. Buck's capital sentencing trial, his own counsel failed to play their proper role in the continuing challenge of giving effect to "the constitutional promise of equal treatment and dignity," *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2214 (2016), when they elicited a psychologist's opinion that Mr. Buck was more likely to represent a future danger to society because he is black. The State of Texas subsequently promised not

to stand in the way of attempts to reverse the death sentences of Mr. Buck and five other individuals in whose cases similar testimony had been given, but failed to abide by its word. *See Buck v. Stephens*, 623 F. App'x 668, 674 (5th Cir. 2015). Despite these facts, the Fifth Circuit denied a COA. *Id.*

Similarly, though the constitutional error at issue in this case is clear on the merits, at a minimum "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citations omitted). Before the Fifth Circuit and before this Court, numerous jurists have indicated interest in Mr. Buck's arguments in this case. *See Buck v. Thaler*, 132 S. Ct. 32, 33 (2011) (Alito, J., respecting denial of certiorari); *id.* at 35 (Sotomayor, J., dissenting from denial of certiorari).

This Court should reverse the Fifth Circuit's decision not to reopen the judgment in Mr. Buck's case, which was arrived at through that court's continuing practice of prematurely judging cases, rather than allowing full appellate review of potentially meritorious claims, and despite the State of Texas' broken promise to remedy what it admitted to be the "pernicious" effect of racial discrimination on the administration of justice. Resp. to Pet. for Cert. at 7-8, *Saldano v. Texas*, 530 U.S. 1212 (2000). To uphold the Fifth Circuit's decision could result in further unnecessary and unduly protracted litigation of issues, and failure to protect the individual rights of those sentenced to death.

ARGUMENT

Over the years, the Fifth Circuit has struggled in several instances to come to grips with the teaching of this Court in capital habeas corpus cases. The Circuit continues to develop its own, unwarrantedly restrictive, practices in its initial consideration of whether or not to grant a Certificate of Appealability ("COA"). As a result, this Court is called on again to ensure that the proper grant of a COA, the gateway step to full federal appellate review of a death penalty case arising out of a state court, is not hindered by the Fifth Circuit's adherence to practices that fail to follow this Court's precedents.

I. THE FIFTH CIRCUIT HAS REPEATEDLY FAILED TO FOLLOW THIS COURT'S PRECEDENT CONCERNING ISSUANCE OF A COA.

This Court has at least twice corrected the Fifth Circuit's uncommonly restrictive approach to granting COAs, in *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003) (*"Miller-El I"*), and *Tennard v. Dretke*, 542 U.S. 274, 283-84 (2004).

A. This Court Has Clearly Articulated the Standards for Granting a COA.

A state prisoner who has been denied habeas corpus relief in the federal court, but aspires to reverse that decision on appeal, must first obtain a COA under 28 U.S.C. § 2253(c)(1). A COA issues where there is "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). This Court's precedents explain that a petitioner must "sho[w]

that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (some internal quotation marks omitted)). The prisoner is not "require[d to make] a showing that the appeal will succeed." *Miller-El I*, 537 U.S. at 337. Instead, the prisoner need only "prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part." *Id.* at 338 (quoting *Barefoot*, 463 U.S. at 893).

This Court has clarified that the COA determination is a "threshold inquiry" that "does not require full consideration of the factual or legal bases adduced in support of the claims." *Id.* at 336. Nonetheless, absent a COA, "an appeal may not be taken to the court of appeals." 28 U.S.C. § 2253(c)(1). Consequently, until a COA has issued, the federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners. *Miller-El I*, 537 U.S. at 336.

B. This Court Was Required to Reiterate the Standards for Issuance of a COA in *Miller-el v. Cockrell*, 537 U.S. 322 (2003).

In *Miller-El I*, the Fifth Circuit had denied a certificate of appealability on a claim that the state at Miller-El's trial had exercised peremptory strikes on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). This Court had "no difficulty concluding that a COA should have

issued," and reversed. 537 U.S. at 341, 344. "[Q]uestion[ing]" the Fifth Circuit's "dismissive and strained interpretation of petitioner's evidence," the Court "once again examine[d]" when a state prisoner may appeal the denial or dismissal of his petition for writ of habeas corpus, and it "decide[d] again" that a COA only required a threshold inquiry into the underlying merit of the prisoner's claims. *Id.* at 326-27. Instead, the Fifth Circuit had "decid[ed] the substance of [the] appeal." *Id.* at 342. The Court found that doing this not only "undermine[d] the concept of a COA," but meant the Fifth Circuit was, "in essence, deciding an appeal without jurisdiction." *Id.* at 337, 342.

The Court "reiterate[d]" that "[c]onsistent with our prior precedent and the text of the habeas corpus statute a prisoner seeking a COA need only demonstrate 'a substantial showing of the denial of a constitutional right.'" *Id.* at 327 (quoting 28 U.S.C. § 2253(c)(2)). This meant that a prisoner only needed to establish that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* It is apparent from its language that this Court was required by the Fifth Circuit's opinion to restate existing law, rather than declare any new standards.

The Court described the prosecutors' use of peremptory strikes to eliminate 10 out of 11 eligible black jurors, including striking black jurors who gave answers comparable to those of white jurors, twice using a Texas procedure called a jury shuffle to

move blacks lower on the list of potential jurors, and adopting differing questioning techniques for white and black jurors. *Miller-El I*, 537 U.S. at 331, 333-34, 343-45. The appearance of racial discrimination was further compounded by the long-standing and specific policy of the Dallas County District Attorney's Office of excluding minority venirepeople from juries. *Id.* at 334-35. The Court noted that only the federal magistrate judge had addressed the importance of that historical policy, which the magistrate had found to be "unexplained and disturbing." *Id.* at 347.

This Court stated that it would have had "no difficulty concluding that a COA should have issued," remarking that both the district court and the Fifth Circuit "did not give full consideration to the substantial evidence petitioner put forth," which suggested that prosecutors had systematically excluded blacks from Miller-El's jury, but rather accepted "without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial." *Id.* at 341. This Court's considerable concern about the Fifth Circuit's handling of Miller-El's claim caused it to specifically "question" that court's "dismissive and strained interpretation of petitioner's evidence of [racially] disparate questioning," *id.* at 344, as well as noting that the statistical evidence of racially motivated strikes alone raised an inference of discrimination, *id.* at 342.[2] The Court noted that "[w]hether a

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[2] The Court also noted the Fifth Circuit's adoption of an incorrect standard which improperly merged the requirements of two statutory subsections, 28 U.S.C. § 2254(d)(2) and (e)(1).

comparative juror analysis would demonstrate the prosecutors' rationales to have been pretexts for discrimination is an unnecessary determination at this stage, but the evidence does make debatable the District Court's conclusion that no purposeful discrimination occurred." *Id.* at 343.

Remarkably, this Court was later again required to address the same case in *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"). The Fifth Circuit had granted a COA, but had again rejected Miller-El's claims rather than considering the substantial evidence of racially motivated decision-making earlier recited by this Court's majority.

Upon being obliged to further review the case, this Court reversed and remanded for entry of judgment for Miller-El. 545 U.S. at 266. In doing so, the Court reiterated much of its *Miller-El I* reasoning, while also criticizing the Fifth Circuit's conclusion as being "as unsupportable as the 'dismissive and strained interpretation' of his evidence that we disapproved when we decided Miller-El was entitled to a certificate of appealability." *Id.* at 265. This Court specifically criticized the Fifth Circuit for wandering beyond the record to hypothesize reasons why one particular juror had been struck, stating its "rationalization . . . was erroneous as a matter of fact and law," and admonished the lower court that its substituted reason could not satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions. *Id.* at 250-52. The fact that this Court, in

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Id. at 341.

full review of the merits, adopted an argument that the Fifth Circuit thought did not even merit COA review demonstrates the stringency of that Circuit's COA standard.

C. The Errors Identified in *Miller-El* Continue to Influence Buck's Case.

The Fifth Circuit's flawed analysis of the evidence of racially disparate practices in *Miller-El I* is continued in its approach in Mr. Buck's case. Despite the overt injection of race as a factor for consideration by the jury in Mr. Buck's case by Buck's own counsel, which the Texas Attorney General had acknowledged was constitutional error, first the district court and then the Court of Appeals denied a COA, with the latter rejecting the case as "unremarkable" and not debatable. *Buck v. Stephens*, 623 F. App'x 668, 673-74 (5th Cir. 2015).

Moreover, in *Buck*, the panel went through the relevant factors one by one, determining that the facts and reasons offered in support of each were not "extraordinary," as required by Fed. R. Civ. P. 60(b)(6) and *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005). *Buck*, 623 F. App'x at 672-74. This piecemeal approach had much the same effect as did the Fifth Circuit's approach in *Miller-El II*, 545 U.S. at 265, where this Court noted that, viewed cumulatively, the evidence that had been discounted by the Fifth Circuit was "too powerful to conclude anything but discrimination." *Id.* And, as in *Miller-El I*, the Fifth Circuit's misguided approach also calls for correction because it came in the context of a COA application, resulting in the lower court "deciding [Buck's] appeal without jurisdiction." *Miller-El I*, 537 U.S. at 336-37.

II. THE FIFTH CIRCUIT'S SELF-CREATED RULES TEND TO IMPERMISSIBLY DISFAVOR THE GRANT OF HABEAS CORPUS RELIEF.

In the year after *Miller-El*, this Court was forced to again address the Fifth Circuit's COA standard in *Tennard v. Dretke*, 542 U.S. 274, 283 (2004). While the Court noted that the Fifth Circuit paid "lipservice" to the principles articulated in *Miller-El*, it found that the Fifth Circuit "invoked its own restrictive gloss" on this Court's precedents. *Id.* Thus, in addition to previously having had to correct the Fifth Circuit's unusually burdensome approach to granting COAs, this Court has had to repeatedly re-explain substantive aspects of its already clear jurisprudence in cases arising out of the Fifth Circuit.

A. The Fifth Circuit's Consideration of a COA Again Required This Court's Intervention: In *Tennard*, 542 U.S. 274, 283 (2004).

This Court's seminal decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("Penry I"), reversed a Texas petitioner's death sentence because evidence of his intellectual disability and childhood abuse could not be given effect under the Texas death penalty statute as it then stood. In the years that followed, few of the other petitioners seeking new sentencing proceedings on the same ground succeeded, as the Fifth Circuit developed an anomalous standard for determining the "constitutional relevance" of proffered mitigation evidence, requiring such evidence to establish a

"uniquely severe permanent handicap" that was not attributable to fault on the part of the defendant, and was shown to have a causative link to the offense in question (the "nexus" requirement). *See Tennard v. Cockrell*, 284 F.3d 591, 595 (5th Cir. 2002).

The Fifth Circuit's adherence to its own "constitutional relevance" jurisprudence persisted after this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Holding that the death penalty is disproportionate when applied to people with intellectual disability (mental retardation), *Atkins* took the view that evidence of intellectual disability, whether or not explicitly connected by some "nexus" to the defendant's crime, inherently mitigates a retarded defendant's moral culpability. *Id.* at 316, 318. The Fifth Circuit continued to cling to its self-created "constitutional relevance" standard despite the subsequent decisions of this Court in *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000), which invalidated death sentences because of defense counsels' failure to investigate and develop mitigating evidence. In neither case had the Court suggested that the defendant was required to prove the existence of a "uniquely severe" condition or a "nexus" linking that condition to the offense.

In due course, another death-sentenced Texas inmate whose sentencing evidence indicated that he had an IQ of 67, indicating low intelligence, challenged the Fifth Circuit's disposition of his case, in which the Fifth Circuit had rejected his claim based on *Penry v. Lynaugh* and denied a COA.

Tennard v. Cockrell, 284 F.3d 591 (5th Cir. 2002). Judge Dennis, dissenting from the denial of a COA, noted that the majority, in reaching its decision, had disregarded the holdings of this Court in *Penry*, and relied instead on circuit decisions based on *Penry*'s dicta, which were not "clearly established federal law" for the purpose of 28 U.S.C. § 2254(d)(1). *Tennard*, 284 F.3d at 598-604.

This Court granted Tennard's petition for certiorari, vacated the Fifth Circuit's judgment, and remanded "for further consideration in light of *Atkins v. Virginia*, 536 U.S. 304 (2002)." *Tennard v. Cockrell*, 537 U.S. 802 (2002). The Fifth Circuit on remand reinstated its previous opinion, *Tennard v. Cockrell*, 317 F.3d 476 (5th Cir. 2003), holding that Tennard had never raised an *Atkins* claim per se, but had argued that the jury instructions did not provide a vehicle for giving effect to his mitigating evidence. The Fifth Circuit therefore did not reconsider its "constitutional relevance" requirement, but simply reinstated its original panel opinion.[3] Judge Dennis again dissented from the restored panel opinion.

1. Despite This Court's Stated Principles for Issuance of a COA, the Fifth Circuit Proceeded Along "a Distinctly Different Track."

Returning to this Court on a further petition for

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[3] *Tennard v. Cockrell*, 317 F.3d 476, 477 (5th Cir. 2003) (Dennis., J., dissenting) (same).

writ of certiorari, Tennard again sought consideration of his claim that the jury instructions given pursuant to the Texas sentencing statute were an inadequate vehicle for consideration of his evidence. Tennard also specifically asserted that the Fifth Circuit had incorrectly construed the standards for issuance of a COA, which had been recently reaffirmed by this Court in *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

This Court agreed with Tennard, remarking that "[d]espite paying lipservice to the principles guiding issuance of a COA, *Tennard v. Cockrell*, 284 F.3d, at 594, the Fifth Circuit's analysis proceeded along a distinctly different track. Rather than examining the District Court's analysis of the Texas court decision, it invoked its own restrictive gloss on *Penry I*." *Tennard v. Dretke*, 542 U.S. 274, 283 (2004).

The Court further noted that the Fifth Circuit's test "has no foundation in the decisions of this Court . Neither *Penry I* nor its progeny screened mitigating evidence for 'constitutional relevance' before considering whether the jury instructions comported with the Eighth Amendment. Indeed, the mitigating evidence presented in Penry I was concededly relevant . so even if limiting principles regarding relevance were suggested in our opinion– and we do not think they were– they could not have been material to the holding." *Tennard*, 542 U.S. at 284.

Thus, it was ultimately necessary for this Court to affirmatively reject the Fifth Circuit's test, which was "inconsistent with [the] principles" set out in this Court's foundational Eighth Amendment cases:

Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("Eighth Amendment requires that the jury be able to consider and give effect to" a capital defendant's mitigating evidence); *Boyde v. California*, 494 U.S. 370, 377-78 (1990) (same); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *McKoy v. North Carolina*, 494 U.S. 433, 440-41 (1990) (mitigating evidence is any evidence that tends to warrant a sentence less than death); *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (sentencer must not be precluded from considering any relevant mitigating evidence). *See Tennard*, 542 U.S. at 284-87 (finding that Fifth Circuit was "wrong to have refused to consider the debatability of the *Penry* question" and had assessed Tennard's *Penry* claim under "an improper legal standard" that "has no basis in our precedents").[4] After performing "the analysis the Fifth Circuit should have conducted," *Tennard*, 542 U.S. at 288-89, this Court concluded that Tennard's low IQ evidence was relevant in mitigation, and that the Texas Court of Criminal Appeals' application of *Penry* to the facts of Tennard's case was unreasonable. *Id.* at 288.

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[4] Cases where the Fifth Circuit's "constitutional relevance" test was applied included *Bigby v. Cockrell*, 340 F.3d 259, 273 (5th Cir. 2003); *Robertson v. Cockrell*, 325 F.3d 243, 251 (5th Cir. 2003) (en banc); *Nelson v. Cockrell*, 77 F. App'x 209, 213 (5th Cir. 2003); *Smith v. Cockrell*, 311 F.3d 661, 680 (5th Cir. 2002); *Blue v. Cockrell*, 298 F.3d 318, 320-21 (2002); *Davis v. Scott*, 51 F.3d 457, 460-61 (5th Cir. 1995); *Lackey v. Scott*, 28 F.3d 486, 489-90 (5th Cir. 1994); *Madden v. Collins*, 18 F.3d 304, 308 (5th Cir. 1994); *Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992) (en banc).

2. Even After *Tennard*, the Fifth Circuit Continued to Adhere to Its Own Jurisprudence Rather Than This Court's Precedents.

The Fifth Circuit's difficulty with the correct interpretation of *Penry I* continued even after *Tennard*. Within three years, this Court was compelled to grant certiorari in two companion cases, *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007), and *Brewer v. Quarterman*, 550 U.S. 286 (2007). In *Abdul-Kabir*, the petitioner had unsuccessfully sought habeas relief in the district court. He appealed; the Fifth Circuit affirmed, denying a COA on his claim under *Penry v. Lynaugh*, 492 U.S. 302 (1989), that because they lacked an instruction concerning mitigation evidence, the jury instructions given, based on the Texas sentencing statute, had prevented the jurors from giving meaningful consideration to his evidence of neurological damage and childhood neglect and abandonment. *Cole v. Dretke*, 99 F. App'x 523 (5th Cir. 2004). *Abdul-Kabir*, 550 U.S. at 244-46. This Court specifically ordered reconsideration in light of *Tennard*. *Abdul-Kabir v. Dretke*, 543 U.S. 985 (2004). Although this time the Fifth Circuit granted a COA, it adhered to its prior decision and refused rehearing en banc over dissent. *See Cole v. Dretke*, 443 F.3d 441, 442 (5th Cir. 2006). Even post-*Tennard*, the Fifth Circuit distinguished *Penry* on the basis that Mr. Cole's neurological impairments were not necessarily permanent, and held that evidence of neglect and abandonment as a child was capable of being considered by the jury, even absent a

mitigation instruction. *Cole v. Dretke*, 418 F.3d 494, 506-07 (5th Cir. 2005).

In again remanding the case, this Court reiterated that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty, notwithstanding the severity of the crime or the inmate's potential to commit similar offenses in the future. *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007). In doing so, the Court extensively reviewed the precedents, including *Tennard*'s rejection of the Fifth Circuit's "constitutional relevance test," that should have informed the lower courts' disposition of the case. It ultimately noted that "our post-*Penry* cases are fully consistent with our conclusion that the judgment of the Court of Appeals in this case must be reversed." *Id.* at 264-65.

In *Brewer v. Quarterman*, 550 U.S. 286 (2007), the district court, in the immediate wake of this Court's decision in *Tennard*, had granted penalty phase relief, *Brewer v. Dretke*, No. 2:01-CV-0112-J, 2004 U.S. Dist. LEXIS 14761 (N.D. Tex. Aug. 2, 2004), only for that decision to be overridden by the Fifth Circuit, *Brewer v. Dretke*, 442 F.3d 273 (5th Cir. 2006). The Fifth Circuit's opinion, despite *Tennard*'s emphasis on an expansive approach to mitigation evidence, drew categorical distinctions between childhood abuse and mistreatment as an adolescent, and between mental retardation and mental illness. *Brewer*, 442 F.3d at 279 n.16, 280. This Court reversed, lamenting that "[f]or reasons not supported by our prior precedents, but instead

dictated by what until quite recently has been the Fifth Circuit's difficult *Penry* jurisprudence," the Fifth Circuit had concluded that the denial of a mitigation instruction had not violated *Penry*. This Court noted that the Fifth Circuit had created a "sufficient evidence" standard, although such a requirement for a certain quantum of evidence was suggested "[n]owhere in our *Penry* line of cases." *Brewer*, 550 U.S. at 294. It also remarked that the Fifth Circuit's conclusions that certain categories of mitigation evidence did not require a mitigation instruction had "fail[ed] to heed the warnings that have repeatedly issued from this Court" regarding the extent to which the jury must be allowed to respond to mitigating evidence "in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death." *Id.* at 296.

B. Mr. Buck's Case Is an Appropriate One for This Court to Reinforce the Correct Application of Its COA Standards in the Fifth Circuit.

This Court set out clear explanations, first in *Penry*, and subsequently in *Tennard*, of the constitutional imperative that a sentencing jury must be able to adequately weigh and give effect to any evidence that might tend to warrant a sentence less than death. Nonetheless, this Court was obliged repeatedly to remedy the Fifth Circuit's failure to correctly apply this Court's substantive legal decisions in those cases. The Court has also repeatedly been required to correct the Fifth Circuit's jurisprudence and set it back on course

when it has failed to correctly apply this Court's COA standards also clearly articulated, not least in *Miller-El*, which arose out of the Fifth Circuit itself.[5]

Mr. Buck's case is one where the Fifth Circuit has, once again, clearly failed to implement this Court's teaching concerning the issuance of a COA. Instead, it leapfrogged to a conclusion on an issue which members of this Court have indicated is at least debatable, rather than taking the required procedural step of simply deciding whether a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), had been made, and ordering full appellate briefing. Thus, the "bizarre and objectionable" testimony concerning race, given by the "'defense expert'" at Mr. Buck's trial, *Buck v.*

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[5]A further instance of the Fifth Circuit going its own way in habeas corpus proceedings, while also failing to comply with this Court's guidance on the grant of a COA, has occurred in cases where *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (permitting petitioners to invoke ineffective assistance of collateral counsel as "cause" to excuse a procedurally default claim of ineffective assistance of trial counsel), has been invoked by petitioners who have also been denied funding in federal court to develop claims previously defaulted by state habeas counsel. Not only has the Fifth Circuit maintained its practice of deciding the merits of such cases rather than simply applying the threshold COA analysis, but it adds its own "restrictive gloss" to the funding statute, 18 U.S.C. § 3599. That statute requires only a demonstration that funding is "reasonably necessary," whereas the Fifth Circuit applies a self-created "substantial need" test, which the petitioner typically fails. *See, e.g., Wilkins v. Stephens*, 560 F. App'x 299, 314 (5th Cir. 2014), *cert. denied* 135 S. Ct. 1397 (2015); *Crutsinger v. Stephens*, 576 F. App'x 422, 429-30 (5th Cir. 2014), *cert. denied* 135 S. Ct. 1401 (2015).

Thaler, 132 S. Ct. 32, 33 (Alito, J., respecting denial of certiorari), currently stands un-remedied, both because of the State of Texas' broken promise not to stand in the way of relief, and because of the Fifth Circuit's failure to observe this Court's prior instruction. Providing the Fifth Circuit in this instance with further clear direction for the conduct of habeas corpus proceedings, and particularly appellate review of those proceedings, will not only serve the interests of individual litigants, but reduce the likelihood that this Court will continue to be called on repeatedly to resolve aberrant interpretations of its precedent.[6]

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[6] For example, the Fifth Circuit panel in this case declined to answer whether its usual Fed. R. Civ. P. 60(b) standards set the standard for Fed. R. Civ. P. 60(b)(6) in habeas proceedings. *See Buck v. Stephens*, 623 F App'x 668, 672 (5th Cir. 2015) (citing *Diaz v. Stephens*, 731 F.3d 370, 376-77 n.1 (5th Cir. 2013) (noting that "in the context of habeas law, comity and federalism elevate the concerns of finality, rendering the 60(b)(6) bar even more daunting")). Requiring a different standard for granting Fed. R. Civ. P. 60(b) relief in capital habeas cases would directly contravene this Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), where the Court firmly rejected the argument that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") impliedly repealed Rule 60(b)(6), holding that "Rule 60(b) has an unquestionably valid role to play in habeas cases," albeit that that role may be constrained where successive habeas petitions are involved. *Gonzalez*, 545 U.S. at 534-35.

CONCLUSION

Amici ask that this Court reverse the decision below.

Respectfully submitted,

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In the Supreme Court of the United States

DUANE EDWARD BUCK,
Petitioner,
v.
LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL BLACK LAW STUDENTS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Black Law Students Association ("NBLSA") submits this brief as *amicus curiae* in support of Petitioner. NBLSA is a membership organization formed in 1968 to promote the educational, professional, political, and social objectives of Black law students. Today, NBLSA is the largest student-run organization in the United States, with nearly 6,000 members, over 200 chapters in our nation's law schools, and six international chapters or affiliates. NBLSA maintains an interest in the development of jurisprudence which guards against racial discrimination and promotes a positive legal framework for addressing matters of civil and constitutional rights. Accordingly, NBLSA has a substantial interest in the outcome of this litigation.

SUMMARY OF ARGUMENT

On July 14, 2016, President Barack Obama, speaking at a town hall on race relations, acknowledged "what is true for me is true for a lot of African-American men—is there's a greater presumption of dangerousness that arises from the social and cultural perceptions that have been fed to folks for a long time . . . And I think it is not as bad as it used to be, but it's still there, and there's a

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

history to that."[2] In phrasing the notion of Black dangerousness in such personal terms, President Obama undoubtedly did not mean to suggest that most ordinary Americans regard *him* as dangerous and prone to criminality. The vast majority of Americans no more look upon President Obama as inherently dangerous than they would the Black physician who treats them in the emergency room, the Black firefighter who responds to a call at their home, the Black teacher who speaks with them at a parent-teacher conference, or the Black attorney who appears before them at the bench. But faced with an unfamiliar stranger, placed in stressful circumstances, presented with a criminal defendant, even well-meaning people fall prey to the stereotype that, whether for reason of biology or culture, Black people are inherently violent and dangerous.

This narrative of dangerousness reaches back to slavery when Black people were believed to be not just inferior, but also savage brutes prone to violence and criminality unless domesticated and made docile. Conceived as a popular philosophy, the narrative evolved into a respected scientific doctrine, positing that the very physical attributes of Black people—from the darkness of their skin, to the broadness of their nose, to the coarseness of their hair—were biological manifestations of a lesser-evolved human form. When the Civil War ended, conventional wisdom held that freedom made evident in Blacks what slavery had kept hidden by

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[2] ABC News, *President Obama and the People Town Hall: A National Conversation*, YOUTUBE (July 15, 2016), https://www.youtube.com/watch?v=sNZvIgA0DIc (remarks at 41:58).

giving "loose reins to the animal."[3] During Reconstruction and through Jim Crow, as Black Codes in the South and discriminatory policing in the North literally criminalized Blackness, sociology and statistics replaced Darwinism and eugenics in arguing for innate Black criminality. In the so-called progressive era, well-meaning reformers advocated for more humane treatment of criminals but still warned that the Black criminal was a breed apart because the propensity for crime revealed the faults of an immature race.

The narrative of Black criminality is not some vestigial relic of a long dead past. The most rigorous cognitive and psychological scientific research of the last sixty years has shown that even in our own enlightened modern times, vast segments of society hold the belief that Blacks and Whites occupy different moral universes, that Blacks are more prone to criminality than Whites, and that the most salient aspects of Black character are "laziness, murderous violence, and sexual intemperance."[4] As recently as June 2016, a Reuters/Ipsos public opinion poll revealed that a shockingly high number of people of all political stripes described Blacks as unintelligent, lazy, violent, and criminal.[5]

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[3] Eugene R. Corson, *The Future of the Colored Race in the United States from an Ethnic and Medical Standpoint*, 15 N.Y. MED. TIMES 193, 201 (1877); EQUAL PROTECTION AND THE AFRICAN AMERICAN CONSTITUTIONAL EXPERIENCE: A DOCUMENTARY HISTORY 149–50 (Robert P. Green, Jr. 2000).

[4] ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA 41 (2010).

[5] Emily Flitter & Chris Kahn, *Exclusive: Trump Supporters More Likely to View Blacks Negatively*, REUTERS (June 28, 2016, 8:41 PM), http://www.reuters.com/article/us-usa-election-race-idUSKCN0ZE2SW.

So, when an expert witness told the jury that Mr. Buck was dangerous because he is Black, he dredged up into the open for all members of the jury to see the monstrous specter that is never far from the surface: the violent Black brute, the single most fearful, dehumanizing, and cruel stereotype Black people have had to endure. In so doing, he did not just make a passing reference to race; he made race the central question for determining whether Mr. Buck should be put to death. This is constitutionally and morally indefensible.

Any procedure that bars review of a death sentence must give way to the greater constitutional and moral imperative of ferreting out impermissible appeals to a defendant's race. Historically, Black defendants have been subjected to greater rates of charging, higher rates of conviction, and longer and harsher sentences. This Court has worked deliberately to correct these disparities, to exorcise race from our criminal justice system, and to develop a jurisprudence that fosters justice and equity. Therefore, this Court should not now let stand a procedural bar to consideration of a defendant's claim that race was a factor in a jury's death sentence.

ARGUMENT

I. THERE IS DEEPLY ROOTED IN OUR HISTORY, INDELIBLY STAMPED IN OUR PSYCHE, AND STUBBORNLY PRESENT IN OUR CULTURE A CRUEL AND DEHUMANIZING STEREOTYPE THAT BLACK PEOPLE ARE UNIQUELY VIOLENT AND DANGEROUS

A. The Ideology of Slavery Held as Its Fundamental Tenet that Blacks Were by Their Nature Savage Brutes Prone to Violence and Criminality Unless Domesticated and Made Docile by the Firm Hand of a White Master

Thomas Jefferson believed that "the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments both of body and mind."[6] Though he conceded he did not have much evidence to back up his opinion, he still insisted that "in general their existence appears to participate more of sensation than reflection."[7] In Jefferson's time the racial prejudice that would eventually lead White Americans to conclude that "black men were not really men but cattle,"[8] had not yet quite hardened into an ideology of race that posited that Black people were biologically a lower life form. However, in both North and South, among both slaveholders and abolitionists, the belief that Black people were an alien and dangerous presence gained wide currency in early Nineteenth century America.

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[6] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 150 (1832).

[7] *Id.* at 146.

[8] JAMES BALDWIN, NOTES OF A NATIVE SON 168 (1955).

After Virginia briefly considered but ultimately rejected legislative proposals that would have led to emancipation, Professor Thomas R. Dew of William and Mary College explained that Black people were unfit for emancipation because they were "differing from us in color and habits and vastly inferior in the scale of civilization."[9] Like Jefferson, Dew concluded that the supposed indolent and violent nature of Black people resulted from "an inherent and intrinsic cause."[10] Defending slavery from abolitionist argument, William Drayton, a Charleston lawyer, argued that "personal observation must convince every candid man that the negro is constitutionally indolent, voluptuous, and prone to vice, that his mind is heavy, dull, and unambitious, that the doom that has made the African in all ages and countries, a slave—is the natural consequence of the inferiority of his character."[11]

Even Northern abolitionists were not altogether free of the idea of Black criminality. A group of New Jersey abolitionists cautioned that free Blacks "were given to idleness, frolicking, drunkenness, and in some few cases dishonesty."[12] A Philadelphia abolitionist "described most

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[9] GEORGE M. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914 45 (1987)

[10] Thomas R. Dew, *Professor Dew on Slavery, in* THE PRO-SLAVERY ARGUMENT 287, 429 (1853).

[11] WILLIAM DRAYTON, THE SOUTH VINDICATED FROM THE TREASON AND FANATICISM OF THE NORTHERN ABOLITIONISTS 232 (1836).

[12] TALI MENDELBERG, RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES AND THE NORM OF EQUALITY 32 (2001).

Philadelphia negroes as degraded and vicious."[13] A New York abolitionist society bemoaned "the looseness of manners and depravity of conduct in many of the persons of Colour in this city."[14] Alarmed by what it perceived as the "depravity of the negro," and concerned about Blacks becoming "both injurious and burdensome," the Massachusetts legislature appointed a committee to study restricting Black immigration to the state.[15]

The doctrine of inherent Black inferiority first began as a popular emotional justification for slavery. However, it soon became "the basis of a world view, an explicit ideology around which the beneficiaries of white supremacy could organize themselves and their thoughts."[16] Central to this worldview was the notion that Black people were not just inferior, but also and more importantly that they were by their very nature savage brutes prone to violence and criminality unless "domesticated" and made docile in slavery. Thus, in order to reconcile the notion of Blacks as "naturally mendacious ...and thievish"[17] with the Southern claim of slaves as "contented, peaceful and harmless,"[18] proslavery propagandists conjured up the concept of the duality of negro character:

> According to this theory, the Negro was by nature a savage brute. Under

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[13] FREDERICKSON, *supra* note 9, at 4.
[14] ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH 223–24 (1967).
[15] *Id.* at 225.
[16] FREDERICKSON, *supra* note 9, at 47.
[17] WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE 17 (1853).
[18] FREDERICKSON, *supra* note 9, at 52.

> slavery, however, he was domesticated or, to a limited degree, civilized. Hence docility was not so much his natural character as an artificial creation of slavery. As long as the control of the master was firm and assured, the slave would be happy, loyal and affectionate; but remove or weaken the authority of the master, and he would revert to type as bloodthirsty savage.[19]

In the decades preceding the Civil War, the popular philosophy of the dual Black character evolved into a respected scientific doctrine. In 1839, Dr. Samuel George Morton published, CRANIA AMERICANA, or what he called an empirical study of racial differences. According to Morton, careful examination of the size and shapes of different types of men led to the inevitable conclusion that Blacks represented an altogether different species.[20] Dr. Josiah Nott, an ethnologist originally from Mobile, Alabama who would later become the Dean of the School of Science at Harvard University, firmly believed that Africa was the homeland of "a succession of human beings with intellects as dark as their skins,"[21] and "attempted to convince educated Americans that the Negro was not a blood brother to the whites."[22] Relying in part on measurements of skull capacities, facial features, and even hair textures of Black and White cadavers, Nott concluded that the anatomical differences

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[19] *Id.* at 53–54.
[20] *Id.* at 74–75.
[21] MARLI F. WEINER & MAIZE HOUGH, SEX, SICKNESS AND SLAVERY: ILLNESS IN THE ANTEBELLUM SOUTH 18 (2012).
[22] FREDERICKSON, *supra* note 9, at 75.

between Whites and Blacks were "greater than the differences in the skeleton of the Wolf, Dog and Hyena, which are allowed to be distinct species."[23]

Though Nott was indisputably a White racialist committed to the cause of slavery, his views of Black savagery were made respectable by a veneer of scientific discourse. Thus, in 1851, John Campbell, a prominent scholar, was able to use Nott's work to publish a remarkable volume titled Negro-Mania, in which he summarized the scientific consensus on Black savagery:

> We every where find proofs of . . inflexible cruelty, selfishness and disposition to cheat, a want of all sympathetic impulses and feelings, the most brutal apathy and indolence, unless roused by the pressure of physical want, or stimulated by the desire of revenge and the thirst of blood.[24]

B. In the Post Civil War Era, Scientists Maintained that No Greater Menace Faced the Nation than the Threat Posed by the "Load of African Negro Blood"

The Civil War brought former slaves "suddenly, violently ...in a new birthright, at a time

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[23] JOSIAH NOTT, TWO LECTURES ON THE NATURAL HISTORY OF THE CAUCASIAN AND NEGRO RACES 25 (1844).

[24] JOHN CAMPBELL, NEGRO-MANIA: BEING AN EXAMINATION OF THE FALSELY ASSUMED EQUALITY OF THE VARIOUS RACES OF MEN 137 (1851).

of war and passion, in the midst of the stricken, embittered population of their former masters."[25] Post-bellum scientists took stock of these new birthright citizens and concluded that "during slavery . . so far as the merely physical man was concerned they were better off . . But since the war and emancipation things have reversed; freedom gave loose reins to the animal."[26] Chief among scientists warning about Black criminality was Nott. In an influential article titled "The Negro Problem," he explained that Blacks were "bred first in a savagery that had never been broken by the least efforts towards a higher state."[27] He insisted that "judged by the light of all experience, these people are a danger to America greater and more insuperable than any of those that menace the other great civilized states of the world," and that no challenge facing the country was as great as "compared to this load of African negro blood that an evil past has imposed upon us."[28]

While Nott harbored no doubt about the inherent criminality of Black people, he cautioned that more research was needed to fully understand its origins. The American ethnographers, anthropologists, physicians, penologists and statisticians who took up the call for more research almost uniformly concluded, as did Henry Martin Boies, a leading penologist, that Blacks were prone

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[25] W.E.B. Du Bois, *The Freedmen's Bureau*, ATLANTIC MONTHLY (Mar. 1901) at 354, 357, http://www.theatlantic.com/past/docs/issues/01mar/dubois.htm.
[26] Corson, *supra* note 3, at 196.
[27] BOOKER T. WASHINGTON ET AL., THE NEGRO PROBLEM 697 (1903).
[28] *Id.* at 699.

to criminality because they had "strong animalism by nature and cultivation," which resulted in a lack of "virtue and little moral restraint."[29]

Greatly influenced by social Darwinism, eugenics and other European theories of hereditary criminality, post-bellum social scientists "largely understood criminals as falling into one of two categories: occasional and habitual. Most crime stemmed from poverty, poor environment, and poor moral training, typical motivating factors for occasional criminality. Habitual criminals, however, were biologically deficient and morally bankrupt individuals."[30] To these scientists, "habitual criminals possessed common atavistic traits—physical and mental characteristics that otherwise distinguished them from normal human beings." Superimposed upon what Charles Sumner called the "oligarchy of the skin,"[31] eugenist theories of criminality as being hereditary effectively equated Black skin with criminal traits. As such, Americans "envisioned civilized White heterosexual society in a perilous battle not simply to maintain social, political, and moral authority, but also to preserve their gene pool and the sanctity of whiteness."[32]

Of course, the tragic irony is that many of these scientists and reformers warning of the

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[29] HENRY M. BOIES, PRISONERS AND PAUPEPS: A STUDY OF THE ABNORMAL INCREASE OF CRIMINALS AND THE PUBLIC BURDEN OF PAUPERISM IN THE UNITED STATES; THE CAUSES AND THE REMEDIES 73 (1893).

[30] KALI N. GROSS, COLORED AMAZONS: CRIME, VIOLENCE, AND BLACK WOMEN IN THE CITY OF BROTHERLY LOVE, 1880–1910 133 (1st ed. 2006).

[31] CHARLES SUMNER, VOL. 14: HIS COMPLETE WORKS 292 (1900).

[32] GROSS, *supra* note 30, at 133.

dangers of Black criminality in the post-bellum era were able to offer what seemed to be irrefutable data of a wave of Black crime at the end of the Civil War. That is because the Black Codes enacted by every single Southern state had succeeded in essentially criminalizing Blackness.[33] To social scientists studying crime in America, the innate criminal nature of Black people rather than Southern Black Codes and Northern racial discrimination served to explain the seeming prevalence of crime in the Black population. In fact, the notion of Blacks as inherently criminal gained wide purchase in the post-bellum years in part because most of the scientists advancing that theory claimed to be dispassionate truth seekers free of irrational racial prejudice.

Thus, in 1896, the same year this Court validated American racial apartheid in *Plessy v. Ferguson*, 163 U.S. 537 (1896), Frederick Ludwig Hoffman, a German-born and educated actuary and statistician from Prudential Insurance Company, published a study warning that freedom had made evident an aspect of the Black character that slavery had managed to keep hidden: a propensity for criminality.[34] Specifically, Hoffman observed that in slavery it was "well known that neither crime [nor] pauperism existed."[35] But, using data from the 1890 census, Hoffman showed that, while Blacks were

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[33] *See* W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 167 (1962) (noting that although "[n]egroes were no longer real estate... [n]egroes were liable to a slave trade under the guise of vagrancy and apprenticeships laws").

[34] *See generally* FREDERICK L. HOFFMAN, RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO (1896).

[35] *Id.* at 217.

only 12 percent of the population, they represented 30 percent of all prisoners, 30 percent of those imprisoned for violent crimes, 41 percent of those imprisoned for rape, and nearly 50 percent of those imprisoned for arson.[36] While the numbers appeared, as Hoffman put it, to speak for themselves, in truth Hoffman's statistics were part of a carefully crafted racial narrative all the more pernicious for seemingly being scientifically neutral. Hoffman's own data showed crime statistics for Blacks were no different than those of immigrants and poor Whites. But, whereas Hoffman explained crime among poor White immigrants as a function of economic deprivation and societal discrimination, he insisted that crime among Black people was a function of innate characteristics. Hoffman's use of data was revolutionary because he "combined crime statistics with a well-crafted white supremacist narrative to shape the reading of black criminality while trying to minimize the appearance of doing so."[37] Indeed, by carefully reporting not just crime statics but also data showing increase in education among Blacks, Hoffman was able to argue that beneficial social institutions such as schools and churches that would normally have civilizing effects on White criminals had no impact on Blacks. His words bear reproducing in full:

> I have given the statistics of the general progress of the race in religion and education for the country at large, and have shown that in church and school

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[36] KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS 51 (2011).
[37] *Id.*

> the number of attending members or pupils is constantly increasing; but in statistics of crime and the data of illegitimacy the proof is furnished that neither religion nor education has influenced to an appreciable degree the moral progress of the race. Whatever benefit the individual colored man may have gained from the extension of religious worship and educational processes, the race as a whole has gone backwards rather than forwards.[38]

C. The Progressive Era Exchanged the Biological Determinism of Black Individuals Being Innately Violent with the Cultural Determinism of Black Communities Being Peculiarly Tolerant of Criminality

At the turn of the twentieth century, social scientists and reformers abandoned theories of biological determinism equating Blackness with crime. However, in search of an explanation for what they perceived as a disproportionate share of criminal behavior by Black people, arguably well-meaning reformers and supposedly enlightened scientists exchanged one form of racial determinism for another: crime was unique to Blacks not by reason of their biology but by reason of their culture. That is to say, reformers explained White criminal behavior as a function of *general* socio-economic forces, but described Black criminal behavior as a function of *particular* Black culture.

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[38] *Id.* at 52.

For example, Frances Kellor, a White female criminologist, traveled the South measuring body sizes and shapes of Black female prisoners to show that there were no inherent biological differences between Black and White criminals.[39] However, looking at crime statistics, Kellor nonetheless drew an essentialist distinction between White and Black criminals: "The Negroes' criminality is that of an undeveloped race...The Negroes' crime show an absence of social and personal responsibility, and are an outgrowth of impulse rather than of well-laid plans and complicated schemings."[40] Frederic Bushee, a leading Boston reformer and author of immigrant life, noted the high crime rate in Irish and Italian communities. He also remarked that they brought "many valuable traits to the American people," and that "it is fortunate that they possess the characteristics which make them easily assimilable."[41] However, whereas rampant crime in immigrant communities did not prevent reformers like Bushee from understanding the nurturing of immigrants as key to the nation's health, they remained adamant that culturally, Blacks were different: "The Negroes in general reveals the faults of an immature race" and that, unlike immigrants, assimilation into American society was "not desirable."[42]

As always, W.E.B. Du Bois put it best:

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[39] *Id.* at 88.

[40] FRANCES KELLOR, EXPERIMENTAL SOCIOLOGY: DESCRIPTIVE AND ANALYTICAL: DELINQUENTS 31 (2010).

[41] FREDERICK A. BUSHEE, ETHNIC FACTORS IN THE POPULATION OF BOSTON 158 (1903).

[42] *Id.* at 115, 160.

> Murder may swagger, theft may rule and prostitution flourish, and the nation gives but a spasmodic, intermittent and lukewarm attention. But let the murderer be black or the thief brown or the violator of womanhood have but a drop of Negro blood, and the righteousness of the indignation sweeps the world. Nor would this fact make the indignation less justifiable did not we all know that it was blackness that was condemned, and not the crime.[43]

D. In the Modern Era, Subtle Skin-Color Coding of Dangerousness Ushered in the Rise of Hoodlums and Villains

Between the two world wars and up until the modern civil rights movement, the naked racial theories that painted Blacks as black-hearted villains did not altogether disappear from mainstream consciousness. Indeed, as the centuries progressed, the various malignancies associated with Blackness were conflated into a fearful specter of death and destruction. The "bad classes of Negroes" seemed to grow larger each year; their criminal appetites and deviant sexual desires less easily sated than ever before."[44] In those years, the narrative of Black violence acquired explicit sexual overtones, in

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[43] W.E.B. DU BOIS, THE SOUL OF WHITE FOLK (1920), *reprinted in* W.E.B. DU BOIS, W.E.B. DU BOIS: SELECTIONS FROM HIS WRITINGS 167 (2014).

[44] WILLIAM L.VAN DEBURG, HOODLUMS: BLACK VILLAINS AND SOCIAL BANDITS IN AMERICAN LIFE 149 (2004).

which "two-legged monsters," consumed by lust and "rotten" with venereal diseases posed a constant threat to White women.[45]

However, with the advent of the civil rights movement, overt expressions of Black people as racial villains fell out of fashion, to be replaced with more coded but no less potent language. To be sure, some still clung to overt biological claims. Thus, in reaction to civil disorder and unrest growing out of civil rights protests, William Parker, then the Chief of Police for Los Angeles, explained "you cannot ignore the genes in the behavior pattern of people," comparing Black "hoodlums" to monkeys in a zoo.[46] But for the most part, descriptions of Black criminality became more coded and subtle. Individuals, who after years of discrimination, finally reacted out of frustration, were typically described as "lacking respect for authority," "hoodlums," "marauders," or engaged in "guerilla warfare."[47]

II. THE NARRATIVE OF BLACK DANGEROUSNESS REMAINS PART OF OUR CULTURAL WORLDVIEW

Historian Barbara Fields tells us that "ideas about color, like ideas about anything else derive their importance, indeed their very definition, from their context."[48] The automatic presumption of Black

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[45] LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 301 (1998).
[46] VAN DEBURG, *supra* note 44, at 41.
[47] *Id.* at 152–53.
[48] Barbara J. Fields, *Ideology and Race in American History*, *in* REGION, RACE, AND RECONSTRUCTION: ESSAYS IN HONOR OF C. VANN WOODWARD 143, 146 (1982).

dangerousness is not driven by any sort of primordial biological impulse, but is a social construct that has been, in President Obama's words, "fed to folks for a long time." And, the most rigorous social science of the last sixty years shows that this social construct, ancient as it may be, remains part of our cultural worldview.

A. In a Wide Set of Circumstances Americans Strongly and Automatically Stereotype Blacks as Violent Criminals

Social scientists have long confirmed what most of us instinctively know: we all carry implicit biases against others who we perceive to be different from us. In the case of Blacks:

> The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years. Researchers have highlighted the robustness and frequency of this stereotypic association by demonstrating its effects on numerous outcome variables, including people's memory of who was holding a deadly razor in a subway scene, people's evaluation of ambiguously aggressive behavior, people's decisions to categorize weapons as weapons, the speed at which people decide to shoot someone holding a weapon, and the probability that they will shoot at all. Not only is the association between

> Blacks and crime strong, it also appears to be automatic."[49]

The Implicit Aptitude Test ("IAT") is the most rigorous study on implicit racial bias and tests automatic associations by individuals. The most widely known IAT pairs faces of Black or White men with "good" or "bad" words. Without fail, the test shows that the majority of takers are slower to associate Black faces with "good" words. The most notable and extreme unconscious biases that social scientists have discovered are enduring stereotypes of Black people as dangerous, less-than-human criminals. Even when people are supposedly unaware of historical stereotypes associated with Black people, they associate Blacks with qualities that fit these historical biases. Thus, an IAT using Black and White faces and pictures of apes and non-ape animals showed that individuals associate Black people with apes even though the majority of participants indicated that they had never heard of the Blacks as apes stereotype.[50]

But social science research has gone beyond just unconscious associations. Cognitive scientists and psychologists have used selective-attention studies to demonstrate that people feel more threatened by Black people than White people.[51] The

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[49] Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004).

[50] Philip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCHOL. 292, 292–306 (2008).

[51] Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. EXP'L PSYCHOL. 1322, 1322–27 (2008).

theory of selective attention is that people pay more attention to things that are perceived as threatening. It originally applied to proven threats like spiders and snakes, but studies have discovered that Black men are also viewed as threats. For example, in one study participants found a dot on a screen more quickly if it appeared where there had previously been a Black face than if it appeared where there had been a White face, demonstrating selective attention.[52] Another study found that people were more likely to misperceive an object as a weapon when held by a Black person than when held by a White person and are also more likely to shoot an unarmed Black person than an unarmed White person.[53] When people are primed with a Black face—meaning it flashes in front of them and they do not even realize they have seen it—they are faster to identify a gun and more likely to mischaracterize a tool as a weapon, whereas when people are primed with a White face, they are faster to identify a tool.[54]

In 2004, scientists from Yale University, Stanford University, the Pennsylvania State University, and the University of California, Los Angeles collaborated on a groundbreaking paper, *Seeing Black: Race, Crime, and Visual Processing*. The paper's findings are striking: "When officers were given no information other than a face and when they were explicitly directed to make

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[52] *Id.*

[53] Joshua Correll et al., *Event-Related Potentials and the Decision to Shoot: the Role of Threat Perception and Cognitive Control*, 42 J. EXP'L PSYCHOL. 120, 120–28 (2006).

[54] B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 181–92 (2001).

judgments of criminality, race played a significant role in how those judgments were made. Black faces looked more criminal to police officers; the more Black, the more criminal."[55] Their findings also showed that stereotyping Blacks as inherently dangerous has a perverse looping effect, in which Blackness not only *triggers* association with criminality but also *magnifies* it; when shown a Black face, people who associate Blackness with criminality misremember the Black face as even more stereotypically Black.

In eerily prescient language, the scientists concluded that one inescapable implication of their findings is that:

> Police officers may face elevated levels of danger in the presence of White armed suspects in comparison with Black armed suspects. For example, if police officers have a delayed response to White suspects with guns or knives these officers may be more likely to get hurt, shot, or killed when confronting White armed suspects in comparison with Black suspects. In contrast, unarmed, innocent Blacks may easily become targets of intense visual surveillance by both police officers and the lay public. With their eyes, perceivers may tie individual Black targets to a group-based suspicion—and sadly, Black people who appear stereotypically Black may be the most likely of all to feel the tug.[56]

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[55] Eberhardt et al., *supra* note 49, at 181–92.
[56] *Id.*

B. The Stereotype of Black Dangerousness Is Constantly Reflected in and Reinforced by Popular Media

Nowhere is the stereotype of Black dangerousness more prevalent than in modern popular media. Today, the most common negative stereotypes of Black people are "impressions of laziness, murderous violence, and sexual intemperance."[57] In that way, all manners of national debates about race—from parenting to education to housing—are driven by and even resolved with this idea of the excessive criminality of Black people.

When Richard Sherman, a Black professional football player, gave an interview in which he asserted that he was the best at his position, he sparked extensive attention from news programs and on social media. Sherman, who graduated with a 3.9 GPA from Stanford University, was called "classless," a "monkey," a "thug," and "ghetto," among other racial epithets on social media. Indeed, the word "thug" was used 629 times the day after the interview.[58] Author Ta-Nehisi Coates opined that onlookers, incapable of seeing Sherman as an

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[57] Entman & Rojecki, *supra* note 4, at 41.

[58] Kyle Wagner, *The Word "Thug" Was Uttered 625 Times on TV on Monday. That's a Lot*, DEADSPIN, REGRESSING (Jan. 21, 2014), http://regressing.deadspin.com/the-word-thug-was-uttered-625-times-on-tv-yesterday-1506098319.

individual, "instead [saw] the sum of all American fears—monkey, thug, terrorist, nigger."[59]

Political scientist Tali Mendelberg explains that in the post-civil rights era, explicit race-based appeals that violate norms of equality have been replaced by more subtle visual imagery and coded language that tap into persistent racial prejudices and fears.[60] The racially charged word "thug" functions much in this manner. A contemporary incarnation of the "Black brute" and "Negro savage" archetypes, it connotes violence and brutishness. In 2011, for example, the *New York Post* compared tennis player Serena Williams to a "street thug," after she yelled at a chair umpire during the U.S. Open.[61] Michelle Bachman, Rush Limbaugh, Karl Rove, and many others frequently label President Obama "thuggish" and a "Chicago thug."[62]

The word has been used, too, in the media coverage around the recent shooting deaths of young Black men. For instance, when George Zimmerman's defense team released photographs of 17-year-old Trayvon Martin showing off gold teeth, the *Washington Post* noted how the tactic fed

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[59] Ta-Nehisi Coates, *Richard Sherman's Best Behavior*, THE ATLANTIC (Jan. 20, 2014), http://www.theatlantic.com/entertainment/archive/2014/01/richard-shermans-best-behavior/283198/

[60] MENDELBERG, *supra* note 12, at 6.

[61] Phil Mushnick, *Classless Serena Celebrated*, N.Y. POST (Sept. 16, 2011), http://nypost.com/2011/09/16/classless-serena-celebrated/.

[62] Cindy Boren, *Richard Sherman, Frustrated by Reaction, Equates 'Thug' with Racial Slur*, WASH. POST (Jan. 23, 2014), https://www.washingtonpost.com/news/early-lead/wp/2014/01/23/richard-sherman-frustrated-by-reaction-equates-thug-with-racial-slur/.

directly into the narrative "painting Trayvon Martin as a thug who deserved to die."[63]

The narrative that Blacks are inherently criminal is emphasized further by the overrepresentation of Blacks in crime reporting.[64] One study, which tracked the 2014 news coverage of every major New York network affiliate, found that while 51 percent of the people arrested by the NYPD for violent crime are Black, in evening news coverage Blacks were represented as the suspects 75 percent of the time. This narrative also controls what kinds of stories are told about Black people and Black culture. The *New York Times* recently analyzed the roles that have earned Black actors Academy Awards nominations, revealing how violence and criminalization figure prominently in depictions of Black life. Since the first awards show in 1929, Black men have been nominated twenty times. Thirteen of those performances involved being arrested or incarcerated and fifteen involved violent or criminal behavior.[65]

The effect of this relentless narrative is significant. A national survey conducted in 2010

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[63] Jonathan Capehart, *Pictures Put Trayvon Martin on Trial*, WASH. POST (May 28, 2013). https://www.washingtonpost.com/blogs/post-partisan/wp/2013/05/28/pictures-put-trayvon-martin-on-trial/

[64] Travis L. Dixon & Daniel Linz, *Overrepresentation and Underrepresentation of African Americans and Latinos as Lawbreakers on Television News*, 50 J. COMM. 131, 131–54 (2000).

[65] Brandon K. Thorp, *What Does the Academy Value in a Black Performance*, N.Y. TIMES (Feb. 19, 2016), http://www.nytimes.com/2016/ 02/21/movies/what-does-the-academy-value-in-a-black-performance.html.

asked White respondents to estimate the percentage of burglaries, illegal drug sales, and juvenile crime committed by Blacks. The researchers found that the respondents overestimated actual Black participation in these crimes—measured by arrests—by approximately 20 to 30 percent.[66]

When a narrative is so widely circulated, it comes to bear on every aspect of life. For instance, a 2015 study found that starting at age ten, Blacks were viewed as less innocent than other children. Researchers showed a group of female K-12 teachers identical school records of a fictitious middle school student who had misbehaved. Some teachers received the records labeled with a stereotypically Black name, while others reviewed records labeled with a stereotypically White name. When asked how they would respond to the infractions, teachers were more likely to escalate the response when the student was believed to be Black. The study also found that when a student was believed to be Black, teachers were more likely to attribute the behavior to a larger pattern, rate the incidents as more troubling and warranting of discipline, and were more likely to predict future suspensions.[67]

Research also shows that the presence of Blacks in a neighborhood correlates to the level of *perceived* crime in that neighborhood. A 2001 study

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[66] Justin T. Pickett, *Reconsidering the Relationship Between Perceived Neighborhood Racial Composition and Whites' Perceptions of Victimization Risk: Do Racial Stereotypes Matter?*,
50 CRIMINOLOGY 145, 155–56, 160 (2012).

[67] Jason A. Okonofua & Jennifer L. Eberhardt, *Race and the Disciplining of Young Students*, 26 J. PSYCHOL. SCI. 617 (2015).

of residential surveys and police data from Seattle, Chicago, and Baltimore found a positive association between how residents perceived the level of crime in their neighborhood and the percentage of young Black men living in that neighborhood, even when controlling for a variety of neighborhood characteristics.[68] A 2004 study by researchers from Harvard and the University of Michigan found that as the concentration of minority groups in a neighborhood increases, residents of all races perceive more "disorder," even after accounting for personal characteristics of the respondents and neighborhood conditions.[69]

The idea of Black criminality has become so ingrained in the national consciousness that it is encapsulated in a single racially coded phrase: Black-on-Black crime. This absurd phrase, which is rarely explained but often repeated even by supposedly well-meaning people, is meant to somehow convey the idea that Blacks are so violent that they even kill "their own kind." The truth is Black intra-racial crime is neither unique nor unnatural. The vast majority of violent crimes are intra rather than interracial, and this is particularly true in a society that remains as racially segregated as ours. Yet, the fact that in ordinary discourse the idea of White on White crime never seems to register as a real phenomenon perhaps only goes to show

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[68] Lincoln Quillian & Devan Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime* 107 AM. J. SOC. 717, 717–67 (2001).

[69] Robert J. Sampson & Stephen B. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of 'Broken Windows'*, 67 SOC. PYSCHOL. Q. 319, 319–42 (2004).

how we have so thoroughly made Blacks villains and villains Black.

III. This Court Has Long Worked to Ferret Out the Use of Race in the Criminal Justice System

In light of the history and nature of stereotype catalogued above, the injection of Mr. Buck's race into his sentencing proceeding is extraordinary because for so long this Court has endeavored to remove race from the calculus of guilt and punishment. Jurisprudential development in criminal procedure reflects this Court's profound understanding that racism infects our institutions and must be stamped out wherever possible.

A. Race Can Never Be Allowed to Factor into the Calculus of Guilt or Punishment

Perhaps the central purpose of our criminal law is the regulation of undesirable behavior. By defining behavior that is undesirable, and by prescribing appropriate punishment for that behavior, criminal law not only achieves retribution but also deters defendants and others from engaging in such behavior in the future. The process of criminal law, then, involves determining whether a defendant engaged in proscribed conduct and affording appropriate punishment. A person's race is irrelevant in both matters; allowing race to be considered either in determining guilt or in proscribing punishment is arbitrary and pernicious. Indeed, allowing race to infect criminal law undermines the credibility and integrity of the

criminal justice system. But more than that, allowing race to influence a finding of guilt or a determination of punishment is morally repugnant.

This Court has long endeavored to protect the integrity and fairness of our legal system against the effects of the arbitrary consideration of race, commanding that courts engage in "unceasing efforts to eradicate racial prejudice from our criminal justice system" *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987) (internal citation omitted), because "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice," *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). For example, this Court has repeatedly insisted that exclusion of an otherwise qualified person from serving on a jury on account of race violates due process. *See Ex Parte Virginia*, 100 U.S. 339, 345 (1879) ("The Fourteenth Amendment secures . . . an impartial jury . . selected or chosen without discrimination against such jurors because of their color"); *Strauder v. West Virginia*, 100 U.S. 303, 309–10 (1879) ("That colored people are singled out and expressly denied by a statute all right to participate...as jurors...is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race...equal justice."). *See also Foster v. Chatman*, 578 U. S. ____, 136 S. Ct. 737 (2016) ("The Constitution forbids striking even a single prospective juror for a discriminatory purpose"); *Powers v. Ohio*, 499 U.S. 400, 411 (1991); *Batson v. Kentucky*, 476 U.S. 79, 85 (1986); *Cassell v. Texas*, 339 U.S. 282, 287 (1950); *Norris v. Alabama*, 294

U.S. 587 (1935); *Martin v. Texas*, 200 U.S. 316, 319 (1906); *Carter v. Texas*, 177 U.S. 442, 447 (1900).

Similarly, this Court has held that selective prosecution on the basis of race violates due process. *See Wayte v. United States*, 470 U.S. 598, 608 (1985); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *Oyler v. Boyles*, 368 U.S. 448, 456 (1962); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886). Notwithstanding this Court's commitment to ferreting out selective prosecution on the basis of race, this practice continues to infect our criminal justice system, and lower federal and state courts continue to confront it. In one illustrative case, a Black defendant challenged his prosecution on the ground it was racially motivated. *United States v. Jones*, 159 F.3d 969 (6th Cir. 1998). The defendant pointed to the fact that police officers made custom t-shirts celebrating his arrest and that of his wife, who was also Black, while deliberately leaving out a White codefendant, and then sent a postcard of a Black woman with bananas on her head to the defendant in jail. *Id.* at 975. The Sixth Circuit found that the "undeniably shameful" conduct of the officers "was not only outrageous and unprofessional, but also racially motivated." *Id.* at 977.

Analogously, prosecution for crack cocaine possession or sale has played out along racial lines. *See, e.g., United States v. Tuitt*, 68 F. Supp. 2d 4 (D. Mass. 1999) (not a single White defendant prosecuted in federal court for crack cocaine charges for an entire calendar year in a region that encompassed four counties; only Black and Latino defendants were prosecuted). As this Court has recognized, just like racial discrimination in the jury

selection process and in the decision whether to prosecute, the arbitrary and invidious use of race at any point in a criminal proceeding is fundamentally unfair and undermines any verdict, judgment or sentence.

B. Overt and Subtle Racial Appeals Unjustly Taint Criminal Proceedings

Just as allowing race to infect the determination of guilt or punishment undermines the integrity and fairness of our criminal justice system, so, too, do overt and subtle appeals to racial bias. Whether by a judge, a prosecutor, or defense counsel, an appeal to a jury based on racial prejudice poisons our system of justice. Racial appeals undermine principles of fairness and equity, and bear no rational relationship to one's guilt or to the proper determination of punishment. Notwithstanding the progress from three-fifths of a person to the Civil Rights Act of 1964 and Voting Rights Act of 1965, the passage of time and the evolution of precedent, "racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious." *Rose v. Mitchell*, 443 U.S. 545, 558–59 (1979). Though overt racial appeals are less frequent today, innuendo and insinuation are often used to arouse racial prejudice. Barring review of such invidious appeals subverts the integrity of the criminal justice system. Instead of ensuring fairness, procedural rules that bar review of claims of improper racial appeals secure injustice.

Today, too many prosecutors improperly play to jurors' racial biases. A prosecutor may allude to a defendant's race in connection with a propensity for violence by describing that defendant in animalistic terms, degrading his or her humanity. *See e.g.*, *Bennet v. Stirling*, 2016 WL 1070812 (D.S.C. Mar. 16, 2016) (prosecutor compared the Black defendant to King Kong, describing his victim, a blonde woman, to allude to her being White). Prosecutors may reference Black defendants' relationships with White women to stir up racial prejudice, and courts rightly find these insinuations irrelevant, racially charged and prejudicial. *See, e.g.*, *Moore v. Morton*, 255 F.3d 95, 115 (3d Cir. 2001) (prosecutor referenced Black defendant's White wife); *Bryant v. State*, 25 S.W.3d 924, 925–26 (Tex. App. 2000) (prosecutor referenced Black defendant impregnating "a White girl"); *Dawson v. State*, 734 P.2d 221, 223 (1987) (prosecutor referenced Black defendant's irrelevant "physical relationship" with White woman); *United States v. Grey*, 422 F.2d 1043, 1044–45 (6th Cir. 1970) (overturning death sentence where prosecutor asked character witness whether he knew the Black defendant was "running around with a White go-go dancer"). These cloaked racial appeals do not bear on guilt or innocence, and have no relevance to appropriate punishment; rather these appeals incite racial animus for the purpose of securing conviction or a stiffer punishment.

Racial appeals, which play on the dehumanizing stereotypes discussed above, have no place in our criminal justice system, yet they are disturbingly routine. *See e.g.*, *United States v. Cannon*, 88 F.3d 1495, 1503 (8th Cir.1996) (holding prosecutor's reference to Black defendants as "bad

people" was a due process violation); *United States v. Doe*, 903 F.2d 16, 27–28 (D.C. Cir. 1990) (finding prosecutor's statement that "Jamaican[s][are] ... coming in and they're taking over" and use of "they" and "them" was prejudicial); *McFarland v. Smith*, 611 F.2d 414, 416, 419 (2d Cir. 1979) (finding prosecutor's statement that Black police officer's testimony about Black defendant was credible because it was "someone she knows and that's a member of her own race" created "a distinct risk of stirring racially prejudiced attitudes"); *Withers v. United States*, 602 F.2d 124, 125-27 (6th Cir. 1979) ("Not one white witness has been produced in this case that contradicts [the victim's] position in this case"); *Miller v. North Carolina*, 583 F.2d 701, 707 (4th Cir. 1978) (finding prosecutor's statement that "I argue to you that the average White woman abhors anything of this type...with a Black man" in rape case violated due process); *Kelly v. Stone*, 514 F.2d 18, 19 (9th Cir. 1975) (finding prosecutor asking jury to "[t]hink about the consequences of letting a guilty man...go free. Because maybe the next time it won't be a little Black girl from the other side of the tracks; maybe it will be somebody that you know" denied Black defendant a fair trial when taken together with other inappropriate comments); *United States ex rel. Haynes v. McKendrick*, 481 F.2d 152, 155, 161 (2d Cir. 1973) (finding Black defendants were denied fair trial where prosecutor stated defense counsel's "experience with the people of the colored race" provided knowledge of "their weaknesses and inability to do certain things that maybe are commonplace for the ordinary person to do."); *State v. Hinton*, 43 S.E.2d 360, 361 (1947) (prosecutor's statement "I do not ask you to convict the defendants merely because a White man was

killed by a negro" found to be reversible error). Conjuring racial animus in jurors serves to detract from the administration of justice, from the finding of truth, and from the fairness of a trial.

Prosecutors "may strike hard blows" but they may "not...strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 87 (1935). Because racial appeals so thoroughly taint the fairness of a trial, such appeals are just as illegitimate when made by defense counsel as they are when made by a prosecutor. *See e.g.*, *Kornegay v. State*, 174 Ga. App. 279, 280 (1985) (finding error not harmless where defense counsel stated "Y'all niggers 40 or 50 years ago would be lynched for something like this, but you're not under the law guilty of rape because these people are just as guilty as you are"). Racial appeals brought by any party inject racial animus into a process that should be void of bias. Indeed, any introduction of a racial appeal has an irreversible impact on the entire proceeding, jeopardizing the validity of any findings or determinations: there is no way of discerning whether the result rests on reasonable inferences made from the evidence or bias engendered through racial appeals.

C. This Court Has Routinely Interpreted Procedural Rules and Bars to Permit Review of Impermissible Uses of Race

It is "incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race,

religion, wealth, social position, or class, or *if it is imposed under a procedure that gives room for the play of such prejudices.*" *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring) (emphasis added). This Court's jurisprudence with respect to procedure has reflected Justice Douglas' sentiment in *Furman*. That is, "procedural rules...are designed to enhance the accuracy of a conviction or sentence," *Montgomery v. Louisiana*, 136 S.Ct. 718, 730 (2016), and where proceedings have been infected with racial discrimination, procedural rules cannot shield such prejudice from review.

Just last term this Court addressed exclusions of jurors because of their race and reaffirmed its unconstitutionality. *See Foster v. Chatman*, 578 U.S. ____, 136 S.Ct. 737 (2016). Yet such a meritorious claim may have eluded review were it not for a favorable finding on subject matter jurisdiction. While this Court could have found that Georgia's *res judicata* doctrine barred review of the defendant's *Batson* claim, it instead chose to review the merits of the claim. *Id.* at 1746–47. Procedure should bend toward fairness and justice. Nearly 140 years ago in *Ex Parte Virginia*, 100 U.S. 339 (1879), this Court considered a procedural barrier to reviewing the merits of habeas petitions from district courts. In deciding whether this Court had jurisdiction to grant the writ, the Court held the claims should be reviewed "in favor of liberty." *Id.* at 337. Further, in *Ford v. Georgia*, 498 U.S. 411 (1991), this Court found that Georgia's implementation of procedural bars to *Batson* claims was impermissible. In *Ford* this Court could well have found Georgia's procedural bar consistent with precedent because

the petitioner's claim had already been reviewed under the standards set out in *Swain v. Alabama*, 380 U.S. 202 (1965) (*overruled on other grounds* by *Batson v. Kentucky*, 476 U.S. 79 (1986)); it instead rejected application of the bar and remanded the case for consideration of the merits of the defendant's claims. *Ford*, 498 U.S. at 425.

Similarly, in other contexts, this Court has not hesitated to reach the merits of claims raising substantial constitutional questions notwithstanding the availability of procedural escape hatches. For example, in *NFIB v. Sebelius*, this Court held that review of the challenges to the individual mandate in the Affordable Care Act was not barred by the Anti-Injunction Act. 567 U. S. ____ (2012), 132 S. Ct. 2566, 2582–84, 2593–601 (2012). *See also* 26 U.S.C. § 7421(a); 26 U.S.C. §§ 5000(a), (g)(2). And in *Knox v. SEIU*, 567 U. S. ____ (2012), 132 S. Ct. 2277 (2012), this Court rejected the defendant's mootness claim in part based on the proposition that "as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* at 2288 (*quoting Ellis v. Railway Clerks*, 466 U.S. 435, 442 (1984). *Sebelius* and *Knox* demonstrate that where this Court confronts a profound constitutional question, whether it involves the impermissible use of race, or some other constitutional imperative, precedent and practice allow for review in close cases. Procedure may bend without breaking.

This Court has ensured review of state court decisions of federal questions by avoiding state procedural bars, unless those bars are "strictly or regularly followed." *Hathorn v. Lovorn*, 457 U.S. 255, 262–65 (1982) (holding state procedural bar

inadequate and reviewing state court decision ordering election without compliance with Voting Rights Act). Where this Court has acknowledged steep procedural barriers, it has also conceived just exceptions. For example, federal habeas review of federal claims is barred where there is an adequate and independent finding of procedural default on state law ground, *except* where failure to review the claim would result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722 (1991).

Mr. Buck's case is alive because of this Court's acknowledgment of steep procedural bars unjustly foreclosing review of constitutional violations. This Court recognized in *Martinez v. Ryan* that review of state convictions and sentences are guided by procedural "rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." 132 S.Ct. 1309, 1315 (2012). *See also Trevino v. Thaler*, 133 S. Ct. 1911 (2013) (extending *Martinez* to Texas criminal appeals). Implicit in this principle is that state sentences must be subject to review where the integrity of legal proceedings is threatened. There is no greater corruption of a sentencing proceeding than an overt claim that the defendant's race is a factor that may be considered in assessing a defendant's future dangerousness.

Procedural rules are not absolutes; they are forged in service of principles of fairness, accuracy and justice. This Court has rightly given way to substantive law where procedural rules may have barred such review, particularly where there were potential impermissible uses of race. This case

involves a death sentence infected by overt racial appeals, a finding of future dangerousness tainted by reference to Mr. Buck's race. This Court should properly find these circumstances extraordinary and worthy of review.

CONCLUSION

For all the aforementioned reasons, the judgment of the Fifth Circuit should be reversed.

Respectfully Submitted,

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